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# Supreme Court of the United States

OCTOBER TERM, 1995

OXFORD HOUSE-C., an unincorporated association; OXFORD HOUSE, INC., a Delaware not-for-profit corporation; OXFORD HOUSE-W., an unincorporated association; MISSOURI DEPARTMENT OF MENTAL HEALTH, DIVISION OF ALCOHOL & DRUG ABUSE,

*Petitioners,*

vs.

CITY OF ST. LOUIS,

*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals misapprehended and misapplied the clearly erroneous standard?

## PARTIES TO THE PROCEEDING

Oxford House-C.

Oxford House, Inc.

Oxford House-W.

Missouri Department of Mental Health, Division of Alcohol & Drug Abuse

City of St. Louis

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## PETITION FOR WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 23, 1996.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 77 F.3d 249 (8th Cir. 1996) and is reprinted in the Appendix hereto at pp. A-1—A-8.

The opinion of the United States District Court for the Eastern District of Missouri is reported at 843 F.Supp. 1556 (E.D. Mo. 1994) and is reprinted in the Appendix hereto at p. A-11—A-60.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on February 23, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTES, RULES, AND ORDINANCES INVOLVED

Relevant portions of the Fair Housing Act as amended, 42 U.S.C. §§3601 *et seq.*; Section 504 of the Rehabilitation Act, 29 U.S.C. §794; Rule 52(a) of the Federal Rules of Civil Procedure; and relevant portions of zoning ordinances of the City of St. Louis are set forth in the Appendix hereto, beginning at p. A-61.

## STATEMENT OF THE CASE

On November 26, 1991, petitioners Oxford House-C. and Oxford House, Inc. commenced this action in the United States District Court for the Eastern District of Missouri. Petitioners complained that defendant City of St. Louis had undertaken enforcement efforts against Oxford House-C. because of the handicap of its residents, in violation of the Fair Housing Act, 42 U.S.C. §§3601 *et seq.*; the Rehabilitation Act, 29 U.S.C. §794;

and other federal statutory and constitutional provisions. Jurisdiction in the district court was based on 28 U.S.C. §§1331, 1343(3) and (4), and 42 U.S.C. §3613.

Shortly after the action was filed, the Missouri Department of Mental Health, Division of Alcohol and Drug Abuse obtained leave to intervene as a party plaintiff. In Missouri, the Department of Mental Health provides staff to assist in the location, start-up, and ongoing operation of individual Oxford Houses across the state. Petitioner Oxford House-W. was also added as a plaintiff after the City cited it as an illegal boardinghouse in June of 1992. When the City challenged the constitutionality of the Fair Housing Act, the United States of America was granted leave to intervene pursuant to 28 U.S.C. §2403 and Fed.R.Civ.P. 24(a).

### A. Oxford House and the City of St. Louis

Petitioner Oxford House-C. is a group home for ten recovering alcoholics and addicts which opened in a single-family neighborhood of the city of St. Louis, Missouri in March, 1991. The property leased by Oxford House-C. was owned by the Franciscan Sisters of Mary, a religious order that had formerly used the property as a residence for as many as five nuns. After Oxford House-C. opened, the neighborhood association called a meeting about the House where neighbors voiced concerns about rapists, the safety of neighborhood children, and the residents' criminal records. On the day of the neighborhood meeting, a complaint was made to the City about an "illegal halfway house" operating at the Oxford House-C. property. The neighborhood association also notified the alderman of the concerns raised at the meeting, and he advised the Zoning Administrator and other city officials of his constituents' opposition to the Oxford House.

Thereafter, city inspectors repeatedly came to inspect the House. Inspector supervisor Walter Murphy indicated to the

Franciscan Sisters that because of the neighbors' complaints, he had to find something wrong with the House. He said that the neighbors did not have specific complaints, but were concerned that a "drug rehab house" was in their neighborhood. He also told the Sisters that the neighbors were concerned because the House had a "multiracial population." Murphy then consulted the City's chief zoning official, the Zoning Administrator, about what they "could use" against the House. The Zoning Administrator subsequently testified that he would not want a group home for recovering alcoholics and addicts living next door to him because of their impact on children's safety, property values, and transiency. He instructed Murphy to cite the House for violating the City's zoning use restriction against more than three unrelated people living together in single-family districts.

On July 18, 1991, the City of St. Louis issued a violation letter to the Franciscan Sisters as the record owner of the Oxford House-C. property. The notice alleged that the property was in violation of the three-unrelated-person zoning rule. The citation letter also listed two building code violations involving basement bedroom window space and ceiling height. The City subsequently filed a municipal court information against the Sisters based on the same three zoning and building code violations.[1]

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[1]The Eighth Circuit in this case held that "the City cited the houses for violating the eight-person limit." Appendix hereto ("App.") A-2. However, the district court found that the violation notice regarding Oxford House-C. cited the House for violating the three-person limit. App. A-22, A-46. *See* also Transcript ("Tr.") III, 103; Appellant's Appendix ("Def. App.") 160-161. Furthermore, the parties stipulated and the district court found that the municipal information filed against the Sisters regarding the Oxford House-C. property similarly alleged violation of the three-person limit. App. A-22; Def. App. 73-74, 77. *See* also Appellees' Appendix ("Pltf. App.") 115-116.

In April 1992, after this litigation had begun and long after the violation notice and information on Oxford House-C. had been issued, the City

*(Footnote 1 continued on next page)*

Missouri Department of Mental Health (DMH) staff opened Oxford House-W. on May 1, 1992 for twelve recovering alcoholics and addicts. It was located in a six-bedroom home in another single-family neighborhood in the city. On the day it opened and before any residents other than the DMH staff-member had moved in, neighbors confronted the DMH official and later that evening gathered across the street, pointing and gesturing at the House. Intimidated, the DMH staff-member left by the back door. On that same opening day, neighbors and the neighborhood association president contacted the alderman—the same alderman representing the Oxford House-C. neighborhood. The next day, at a neighborhood social event, neighbors again voiced their fears about Oxford House-W. to the alderman—fears about the safety of neighborhood women and children, transiency, and diminished property values. The alderman notified the city counselor's office which in turn made arrangements with petitioner's counsel to add Oxford House-W. to this action. Oxford House-W. was inspected, and the city cited it for operating as an illegal boardinghouse.

### B. Decisions Below

After an eight-day bench trial, the district court entered judgment for petitioners on their Fair Housing and Rehabilitation Act claims.[2] In a fifty-page Memorandum Opinion, the

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*(Footnote 1 continued)*

amended its zoning code to allow group homes for eight or fewer handicapped persons and two additional people acting as houseparents or guardians as uses by right in single-family districts. App. A-27. Although the eight-plus-two rule was in effect when Oxford House-W. was cited, the violation alleged against it was that the property was being used as an illegal rooming/boarding house or hotel. *See* Pltf. App. 186-187.

[2]The district court declined to reach plaintiffs' constitutional claim. App. A-58—A-59. It further found that plaintiffs did not have a private right of

*(Footnote 2 continued on next page)*

district court found that in its zoning enforcement activities, the City had intentionally discriminated against the Oxford Houses because of their residents' handicap. The ultimate finding of intentional discrimination was based on a number of subsidiary findings, most notably that city officials had undertaken the enforcement efforts because of their own unfounded, stereotypical fears of recovering alcoholics and addicts and because of the neighborhoods' fears about the disability of Oxford House residents.[3]

The district court also found that the City had failed to make reasonable accommodation in its zoning rules and practices by refusing the Oxford Houses' request for non-enforcement of the single-family use restrictions. In reaching that determination, the trial court found that, in light of neighborhood and aldermanic opposition to the Oxford Houses, it would have been futile to seek accommodation through the City's variance process.[4] Petitioners also challenged the City's building code enforcement efforts, but the district court found that, with respect to those activities, they had failed to show either intentional discrimination or failure to make reasonable accommodation.[5]

In an eight-page opinion, the court of appeals reversed as "clearly erroneous" the trial court's finding that the City had enforced its zoning restriction against the Oxford Houses because the residents were recovering addicts and alcoholics.[6] The court of appeals also concluded that the district court had "committed clear error" in finding that it would have been futile for the Oxford Houses to seek accommodation through the City's variance process.[7]

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[3]App. A-20—A-25; A-41—A-45.

[4]App. A-29—A-30; A-54—A-55.

[5]App. A-56.

[6]App. A-5—A-6.

[7]App. A-7.

## REASONS FOR GRANTING THE WRIT

### Certiorari Should Be Granted to Review the Eighth Circuit's Understanding and Application of the "Clearly Erroneous" Standard

The court of appeals' decision in this case is an object lesson in the problems that arise when an appellate court ignores the limited scope of review established by Rule 52 of the Federal Rules of Civil Procedure. In addition to misapprehending the ordinance sought to be enforced against Oxford House, the appellate court below ignored the original version of critical testimony relied on by the district court, ignored the trial court's vantage point for assessing the credibility of witnesses, and, having done so, concluded that the lower court's finding of intentional discrimination and its finding of futility in the City's variance process were both clearly erroneous.

The court of appeals in the instant case did not articulate the standard of review mandated by Rule 52(a), did not discuss its obligations under that standard, nor did it properly apply the standard. More than a decade ago, in 1985, this Court emphasized that the clearly erroneous standard of review is a deferential one. *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985). The decision of the reviewing court in this case suggests that it may be time to re-emphasize that deference to the trier of fact is still the rule and not the exception. *Id.* at 575.

#### A. The Trial Court's Finding of Intentional Discrimination

A finding of intentional discrimination is a finding of fact subject to the clearly erroneous standard of Rule 52. *See Anderson v. Bessemer City*, 470 U.S. at 573; *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982). "'Findings as to the design, motive and intent with which men act' . . . [are] peculiarly factual issues for the trier of fact and therefore subject to appellate review under Rule 52." *Pullman-Standard*, 456 U.S. at 288,

quoting *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

The district court in this case found that the City had intentionally undertaken zoning enforcement efforts against the Oxford Houses because of their residents' disability.[8] It based that determination on subsidiary findings that city officials had undertaken those actions because of their own unfounded, stereotypical fears of recovering alcoholics and addicts and because of the neighborhoods' fears about the disability of Oxford House residents.[9] It found further evidence of the City's discriminatory purpose in the zoning amendments adopted during this litigation.[10] The court of appeals, however, held that the trial court "committed clear error" in finding intentional discrimination.[11]

### 1. Discriminatory Motivation

#### a. City Officials' Animus

The trial court's finding of intentional discrimination rested in part on direct evidence that the Zoning Administrator was biased against plaintiffs because of their disability. The Zoning Administrator testified that he would not want recovering alcoholics and addicts living next door to him.[12] The court of appeals dismissed this evidence as "isolated comments."[13] However, the

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[8]App. A-41—A-45.

[9]App. A-42—A-43.

[10]App. A-43.

[11]App. A-6.

[12]App. A-23, A-42.

[13]App. A-6. In rejecting this evidence of the City's discriminatory motivation, the court of appeals also noted that "the Oxford Houses were plainly in violation of a valid zoning rule and City officials have a duty to ensure compliance." *Id.* Petitioners do not concede that either the three-person or the eight-plus-two rule was valid, but even if it were, a valid rule will

*(Footnote 13 continued on next page)*

Zoning Administrator was the City's chief zoning official and, as the district court found, the city official who made the actual decision to cite Oxford House-C. for violating the zoning code.[14] Furthermore, the statement by the Zoning Administrator was made as testimony in this matter, both in his deposition and at trial. Similar testimony has been considered as properly probative of discriminatory intent. *Anderson v. Bessemer City*, 470 U.S. at 569, 579 (reversing clearly erroneous determination where trial court's finding of bias was based in part on decisionmaker's "testimony . . . that he would not want his wife to perform" the duties of the job in question).

The court of appeals also implied that the Zoning Administrator's testimony had been elicited by a "have you stopped beating your wife" question.[15] With its superior knowledge of the pretrial proceedings in the case, the trial court was aware that the Zoning Administrator had in fact volunteered his bias during deposition:

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*(Footnote 13 continued)*

not immunize discriminatorily motivated conduct. *See LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2nd Cir. 1995); *United States v. Borough of Audubon, N.J.*, 797 F. Supp. 353, 360 (D. N.J. 1991), *aff'd without opinion*, 968 F.2d 14 (3d Cir. 1992); *United States v. City of Parma, Ohio*, 494 F. Supp. 1049, 1099 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). The Fair Housing Act provides as much. *See* 42 U.S.C. §3615 ("any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under [the Act] shall to that extent be invalid").

[14]App. A-23. The City zoning code defines the zoning administrator as "[t]he position responsible for administering and enforcing the Zoning Code." App. A-70, A-76 (§26.08.480 of Ordinances 59979, 62588).

[15]App. A-6 ("when Oxford House's counsel asked the City's Zoning Administrator whether he would want to live next door to an Oxford House, the Zoning Administrator said no and expressed concern about transiency and property values").

Q. Mr. Dobbs, does it impose any burden on the City to have ten recovering addicts and alcoholics living in a single family dwelling at 6957 Clayton?

A. That I can't answer.

Q. You don't know whether it imposes—?

A. No. I wouldn't want them living next door to me, I don't know about you.[16]

The district court found further evidence of bias in the "common, stereotypical fears" about group homes for people with disabilities which the Zoning Administrator offered to explain his testimony—fears about the safety of small children, diminished property values, and transiency.[17]

The district court also relied on direct evidence of discriminatory animus on the part of another key city official. There was testimony at trial that William Kuehling, while serving as special assistant to the mayor, had stated that the Oxford Houses would cause flight from the city.[18] The Eighth Circuit also characterized this evidence as "isolated comments."[19] Kuehling's statement, however, was made to Missouri Department of Mental Health officials in response to their specific request for assistance with locating Oxford Houses in the city.[20] Furthermore, the evidence showed that at the time the City commenced its enforcement efforts against Oxford House-C., Kuehling was the

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[16]Pltf. App. 224. *See also* App. A-23. The district court had specific knowledge of the Zoning Administrator's statement because his deposition testimony was the subject of a motion to compel directed at his refusal, on advice of counsel, to answer why he would not want to live next door to a group recovery home.

[17]App. A-23.

[18]App. A-18, A-42.

[19]App. A-6.

[20]App. A-18.

head of the city department which included both the Zoning Administrator and the building inspection division.[21]

### b. City Deference to Discriminatory Animus in the Community

The trial court also found that the City had undertaken enforcement efforts against the Oxford Houses in response to the neighborhoods' unfounded fears about the disability of Oxford House residents.[22] The court of appeals acknowledged evidence showing that the inspectors were aware of community opposition to the Houses and hoped to find them in violation of the zoning code. According to inspector supervisor Murphy, the neighbors had "concern for the idea that a drug rehab house was in their neighborhood" rather than complaints about any specific problems presented by Oxford House-C.[23] Murphy also felt that the neighbors were concerned because Oxford House-C. had a "multiracial population."[24] He indicated to the secretary for the Franciscan Sisters that he needed to find something wrong with the House because of the neighborhood complaints, and he asked the Zoning Administrator if violation of the single-family use restriction would be "heading in a right direction . . . , if that's what we could use" against the House.[25]

The court of appeals dismissed this evidence because, it said, the inspectors did not hold policymaking positions.[26] However, the City, in its answers to interrogatories, identified inspectors

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[21]App. A-12. *See* also Tr. IV, 7-8.

[22]*See City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 449 (1985) (City may not defer to the wishes or objections of some fraction of the body politic); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

[23]App. A-23.

[24]App. A-23.

[25]Def. App. 273; App. A-23.

[26]App. A-6.

Murphy and Wente as decisionmakers with regard to inspecting Oxford House-C., issuing the notice of violation against the House, and filing the information against it.[27] Furthermore, inspector supervisor Murphy informed the Zoning Administrator—who, according to the district court, made the decision to cite Oxford House-C. for the zoning violation—of the neighborhood complaints.[28] The Zoning Administrator also learned about the community opposition from the alderman.[29] The alderman had received reports on the neighborhood meeting about Oxford House-C. where concerns were expressed about "increased crime, whether convicted rapists lived in [the House], and whether children would continue to be safe in the neighborhood," and he heard similar fears voiced by other neighbors of the House.[30]

The court of appeals also insisted that the inspectors' conduct and remarks were taken out of context.[31] There was, however, no dispute about what actions the inspectors took, only about why they took them. As to the inspector's statements, the trial court was able to judge the credibility of the inspector supervisor and

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[27]Pltf. App. 73-75.

[28]Tr. III, 193-194.

[29]Tr. IV, 102-103.

[30]App. A-20.

[31]The district court found that similar discriminatory animus on the part of neighbors prompted the City to pursue Oxford House-W. App. A-43. The evidence showed that on the day that the House opened and before any residents other than a Department of Mental Health staff-member had moved in, neighbors expressed concerns about the House to their alderman (the same alderman who represented the Oxford House-C. neighborhood). Their concerns reflected the same stereotypical fears about property values, transiency, and the safety of neighborhood women and children. On that very same day, the alderman notified the city counselor's office, and arrangements were made to add Oxford House-W. to this litigation. The district court found that if it had not been so joined, the City would have proceeded with enforcement actions against it. App. A-23-26.

the Franciscan sister who testified about her conversations with the inspector supervisor. The sister's testimony was supported by her notes about those conversations.[32] In reality, the Eighth Circuit simply disagreed with the district court's conclusion that this evidence showed city officials had acted in response to community bias against the protected group. But the district court's account of the evidence and the inferences it drew from that evidence are more than "plausible in light of the record viewed in its entirety," and therefore "the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. at 573-574.

### c. Zoning Changes Also Evidence the City's Discriminatory Animus

The district court also based its finding of intentional discrimination on the zoning amendments enacted by the City in the midst of this litigation. Although the trial court saw these changes as further evidence of the City's discriminatory animus, the court of appeals did not address this basis of the intentional discrimination finding.[33] This Court, however, has recognized that the timing, substantive consistency, and legislative history of zoning changes may shed light on a municipality's discriminatory purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-268 (1977).

The district court considered those very aspects of the City's zoning amendments. In April 1992, some four months after this litigation had begun, the City modified its zoning code to permit group homes for eight or fewer handicapped residents and two houseparents or guardians as uses by right in single-family districts. As the trial court noted, this amendment belatedly

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[32]Def. App. 274.

[33]App. A-43.

brought the City thus into compliance with the minimum requirements of state law—requirements which had been on the books since 1985. While the City thus made certain that it was in compliance with state law by the time of trial, it did so in a way that still precluded Oxford House-C. from remaining in its single-family district.[34]

To the district court, the substantive inconsistency in the City's zoning treatment of Oxford House further evidenced its discriminatory purpose.[35] In the zoning amendments adopted in April 1992, the City allowed other uses in its single-family neighborhoods which increased congestion, traffic, noise, transiency, and population density. The new amendments allowed bed and breakfast tourist homes with up to seven guestrooms (defined as a room for no more than four persons) as conditional uses in single-family districts.[36] Those same tourist homes could be uses by right in any zoning district, including single-family districts, where a "bed and breakfast district" was designated.[37] The new amendments also allowed two baby-sitting centers per block as uses by right in single-family districts.[38]

At the same time, the City construed its eight-plus-two amendment as a cap on the number of people with disabilities who live in group homes in single-family neighborhoods.[39] Despite the fact that the new rule allowed a total of ten people to reside in a group home as a matter of right, the City would not permit Oxford House-C. to have ten handicapped residents instead of eight plus two houseparents or guardians. Furthermore, the City

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[34]App. A-43.

[35]App. A-52.

[36]App. A-27, A-75, A-76, A-78 (§§26.08.053, 26.08.230, 26.20.025.1 of Ordinance 62588).

[37]App. A-27, A-79 (§3(B) of Ordinance 62589).

[38]App. A-27, A-77 (§26.20.020.8 of Ordinance 62588).

[39]Tr. III, 215.

did not amend the conditional uses allowed in single-family districts to allow group homes with more than eight handicapped residents.[40] Similar inconsistencies in the zoning treatment of a group home for people with disabilities were fatal in *City of Cleburne*. *See* 473 U.S. at 447-448.

The district court also heard testimony from the alderman who sponsored the new zoning amendments. It was the alderman for the ward in which Oxford House-C. (and subsequently, Oxford House-W.) was located. He admitted knowing of his constituents' fears about the group recovery home, and those fears reflected discriminatory animus toward recovering alcoholics and addicts.[41] He offered no coherent explanation for the substantive inconsistencies in the City's treatment of Oxford House, thus confirming the district court's inference of discriminatory purpose.[42]

There was more than sufficient evidence in the record to support the trial court's finding that animus against the protected group motivated both the City decisionmakers themselves and those to whom they were knowingly responsive.

### 2. Differential Treatment

#### a. Explicit Facial Discrimination

The court of appeals also rejected the trial court's finding of intentional discrimination because "Oxford House did not show the City treated the Oxford Houses differently from any other group."[43] However, the new zoning amendment adopted by the City explicitly classifies on the basis of handicap and thereby

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[40]App. A-27, A-78 (§26.20.025 of Ordinance 62588).

[41]App. A-20.

[42]App. A-25, A-27.

[43]App. A-5.

treats the Oxford Houses and other group homes for people with disabilities differently from any other group. Just as it did not address the district court's reliance on the zoning amendment as additional evidence of discriminatory motivation, the court of appeals also failed to assess the new amendment using the traditional framework for analyzing disparate treatment through explicit facial discrimination.

That analysis focuses on the explicit terms of the policy, not on the motives of the policymakers. *International Union, UAW v. Johnson Controls, Inc.*, __U.S.__, 111 S.Ct. 1196, 1203 (1991) ("Whether an employment practice involves explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination"). Thus, a policy or practice is facially discriminatory when it expressly classifies on the basis of protected status, and it will constitute discrimination *vel non* unless defendant proves that the policy or practice is justified under a statutory affirmative defense. *See id.* at 1204; *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985). This framework has been used to analyze policies which expressly classify on the basis of gender and age. *Johnson Controls*, 111 S.Ct. at 1203-1204; *Thurston*, 469 U.S. at 121. The Tenth Circuit has also applied the framework under the Fair Housing Act to a municipal ordinance facially discriminating on the basis of handicap. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501-1503 (10th Cir. 1995). *See also Horizon House v. Township of Upper Southampton*, 804 F.Supp. 683, 693-694 (E.D. Pa. 1992), *aff'd without opinion*, 995 F.2d 217 (3d Cir. 1993).

On its face, the City's zoning code treats people with disabilities differently from nonhandicapped people. While it caps at eight the number of handicapped persons who may live together by right, it allows an unlimited number of nonhandicapped

related people to do so.[44] It also permits bed and breakfast tourist homes with up to twenty-eight nonhandicapped unrelated residents as uses by right in any zoning district where a "bed and breakfast district" has been designated.[45] Even without such a designation, bed and breakfast establishments with up to twenty-eight occupants are allowed as conditional uses in "A" single family, "B" two family, and "C" multiple family districts.[46] Not so with group homes for nine or more handicapped residents; "homes in which nine or more . . . mentally or physically handicapped persons reside" are conditional uses only in "D" multiple family through "H" area commercial districts.[47]

The City zoning scheme thus involves disparate treatment through explicit facial discrimination. In this case, the City did not prove that its facially discriminatory policy was justified under one of the affirmative defenses established by the Fair Housing Act. The only statutory affirmative defense pled by the City was that its numerical household composition rules were reasonable occupancy standards exempt from the Act's requirements pursuant to 42 U.S.C. §3607(b)(1).[48] Relying on *City of Edmonds v. Oxford House, Inc.*, __U.S.__, 115 S.Ct. 1776 (1995), the Eighth Circuit held that the City's use restrictions did

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[44]App. A-70, A-71 (§§26.08.160, 26.20.020.1.A of Ordinance 62588). In the legislative history of the 1988 amendments to the Fair Housing Act, Congress indicated that the Act as amended prohibited the "imposition of . . . land-use requirements on congregate living arrangements among non-related persons with disabilities" when those requirements "are not imposed on *families* and groups of similar size of other unrelated people." H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 24, *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, at 2185 (emphasis added).

[45]App. A-27, A-79 (§3(B) of Ordinance 62589).

[46]App. A-27, A-75, A-76, A-78 (§§26.08.053, 26.08.230, 26.20.025.1 of Ordinance 62588).

[47]App. A-27, A-75 (§26.32.025.7 of Ordinance 62183).

[48]Def. App. 149.

not qualify for the statutory exemption. Since the City's zoning policy overtly discriminates on the basis of handicap and does not fall within a statutory exception, the court of appeals erred in refusing to find the policy in violation of the Fair Housing Act and the Rehabilitation Act.

### b. Disparate Treatment of the Oxford Houses

In addition to the disparate treatment apparent on the face of the City's zoning code, there was other evidence that the City treated Oxford House differently from other group living arrangements. To the district court, the clear inference from the evidence was that the City would not have taken enforcement steps against the Oxford Houses if their residents "had been a desirable group of nonhandicapped persons" such as the nuns who had previously lived in the Oxford House-C. property in numbers exceeding the zoning code.[49]

The court of appeals acknowledged petitioners' evidence that various religious orders had more than three unrelated members living together in single-family dwellings across the city.[50] The evidence further showed that no variances or conditional use permits had been granted by the City authorizing those uses, and yet the City had undertaken no enforcement efforts against those group living arrangements.[51] The Eighth Circuit, however, rejected this evidence because, it said, petitioners failed to show that these group living arrangements were not valid pre-existing uses and that the city building inspection office knew of these violations.[52]

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[49]App. A-44.

[50]App. A-5.

[51]Pltf. App. 1-15, 220; Tr. V, 146-151.

[52]App. A-5.

In fact, there was undisputed evidence that these uses were not valid as either pre-existing or accessory uses. Under its nonconforming use provision, the City's zoning code validates only those uses which existed lawfully on May 25, 1950 or on the effective date of the pertinent code amendment.[53] Since the unrelated person rule was part of the 1950 code rather than a later amendment, the use of a single-family dwelling by more than three unrelated people would be valid only if it existed prior to May 25, 1950.[54] In this case, the evidence showed that the various religious orders did not begin to use the buildings in question as dwellings for more than three unrelated members until between 1977 and 1986—well after 1950.[55] In addition, petitioners established that those dwellings were not accessory to other buildings which might have been lawful.[56]

The evidence also showed that the City knew or should have known of the zoning violations by the various religious orders. The alderman for the Oxford Houses knew that a group of nuns lived together in the Oxford House-C. property, but the City never issued any citation regarding that use.[57] Furthermore, the City did not operate an exclusively complaint-driven inspection process. The City building inspection division had an entire section of inspectors devoted to conducting house-to-house inspections for code violations. At least two of the dwellings occupied by unrelated members of the religious orders displayed signs openly and notoriously indicating their use.[58] The City

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[53]App. A-70, A-75 (§26.08.025 of Ordinance 59979, 62588).

[54]The Zoning Administrator testified that the unrelated person rule was part of the City's 1950 zoning code. *See* Dobbs Deposition, May 4, 1992, p. 33, lines 9-16; p. 48, line 25; p. 49, lines 1-25; p. 50, lines 1-21.

[55]Pltf. App. 1-15, 220; Tr. V, 146-151.

[56]Tr. V, 146-151.

[57]Tr. III, 131; IV, 81.

[58]Tr. V, 148, 150.

should have known about and pursued those obvious violations.[59]

The district court's finding of intentional discrimination was amply supported by testimony and other evidence in the record. If the court of appeals had applied the standard of review commanded by Rule 52(a), it should not have set aside that finding by the trial court.

### B. The Trial Court's Finding of Futility in the Variance Process

With respect to petitioners' reasonable accommodation claim, the City took the position that a request for a variance was the only valid way for plaintiffs to seek an accommodation in its single-family use restriction. The trial court, however, found that it would have been futile for the Oxford Houses to pursue a variance.[60] In discerning clear error in the district court's finding of futility,[61] the Eighth Circuit improperly conducted a *de novo* weighing of the evidence and failed to give due regard to the ability of the trial court to assess the credibility of witnesses.

The trial court found that a variance application would have been a futile gesture in this instance because of aldermanic and neighborhood opposition to the Oxford Houses and the City's practice of allowing such opposition to have a dispositive effect on variance and conditional use applications.[62] The court of appeals acknowledged that the neighbors and the alderman were opposed to the Oxford Houses.[63] However, with regard to the impact of aldermanic and neighborhood opposition on variance and conditional use decisions, there was conflicting evidence.

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[59]Tr. III, 73-74.

[60]App. A-54—A-55.

[61]App. A-7.

[62]App. A-29, A-54—A-55.

[63]App. A-7.

During his adverse direct examination, the City's Zoning Administrator conceded that if there were "strong neighborhood opposition" to a variance, "chances would be very good that it would be denied."[64] In his deposition, he had identified "neighborhood input" as the basic factor in the approval or denial of variances.[65] The record also included a statement from the Zoning Administrator in connection with another complaint of housing discrimination against individuals with disabilities. In that matter, the Zoning Administrator stated that "seldomly [sic] is an application for a Condition Use Permit or variance granted in the face of opposition from the community and Aldermen."[66]

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[64]Tr. III, 211.

[65]Pltf. App. 228-229.

[66]Tr. III, 165. The parties stipulated that a housing discrimination complaint had been filed against the City following its denial of a conditional use permit for a residential care facility for individuals with mental disabilities. Tr. III, 158-162. In his interview regarding that complaint, the Zoning Administrator also stated as follows:

> Q. Tell me sir, in light of these facts, would it be feasible for the City to reconsider this application?
>
> A. Yes, Mr. Brown, it would be feasible for us to reconsider the application under these code sections, but if you are asking me, would it make a difference upon the ultimate outcome of the City's decision, I would have to say that this is an extremely difficult question to answer. This is so, because of the high level or volume of opposition from neighbors within the community.
>
> Q. Tell me this, would the affirmative requirements of the code, or its mandatory obligations upon an applicant seeking permission to construct a new property to be used as a residential care facility, create a bar to the cities [sic] legally granting the permit?
>
> A. My best guess would be that it,—that is, the code does not. However, let me add that as a practical matter, I don't see the provisions to which you refer having much impact upon the ultimate outcome of this application, especially as long as there is Alderman and neighborhood opposition.

Tr. III, 164.

The conflicting evidence was adduced when the Zoning Administrator and the alderman for the Oxford House neighborhoods were questioned at trial by counsel for the City. Both city officials indicated that there had been occasions when variances were granted despite community or aldermanic opposition.[67]

The trial judge resolved this conflict in the evidence in favor of petitioners. While acknowledging that it was not impossible for a variance to be granted in the face of opposition from the neighborhood or the alderman, the court concluded that "[t]he clear inference from the evidence presented" was that the Oxford Houses "would have obtained only a denial of the requested variance." The district court therefore found that "the variance process would have provided only a futile remedy."[68] Reading the same record, the Eighth Circuit apparently drew a contrary inference and concluded that the district court had "committed clear error" in its finding of futility.[69]

"Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. at 574. Rule 52 demands even greater deference to the trial court's findings when they are based on his or her decision about which testimony to believe. *Id.* at 575. In this case, the district court chose to credit the Zoning Administrators's admissions against interest rather than the testimony elicited by his own counsel. Those admissions were also confirmed by extrinsic evidence in the form of the Zoning Administrator's statement in another housing discrimination matter. *Id.*

Since there was sufficient evidence in the record to support the district court's finding of futility, the court of appeals should not have set it aside.

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[67]Tr. III, 228-229; IV, 138-139.

[68]App. A-55.

[69]App. A-7.

## CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-1600EM

Oxford House-C, an unincorporated association; Oxford House, Inc., a Delaware not-for-profit corporation; Oxford House-W, an unincorporated association; Missouri Department of Mental Health, Division of Alcohol & Drug Abuse; Missouri Department of Mental Health,

Plaintiffs-Appellees,

v.

City of St. Louis, a Body Corporate,

Defendant-Appellant.

Missouri Municipal League; City of Columbia, Missouri; City of Clayton, Missouri; The National Fair Housing Alliance; The Judge David L. Bazelon Center for Mental Health Law; United States of America; American Civil Liberties Union, of Eastern Missouri,

Amicus Curiae.

No. 94-3073EM

Oxford House-C, an unincorporated association; Oxford House, Inc., a Delaware not-for-profit corporation; Oxford House-W, an unincorporated association; Missouri Department of Mental Health, Division of Alcohol & Drug Abuse; Missouri Department of Mental Health,

Plaintiffs-Appellees,

v.

City of St. Louis, a Body Corporate,

Defendant-Appellant.

Appeals from the United States District Court
for the Eastern District of Missouri.

Submitted: September 12, 1995
Filed: February 23, 1996

Before FAGG, HENLEY, and HANSEN, Circuit Judges.

FAGG, Circuit Judge.

In this handicap discrimination case, we consider whether the City of St. Louis violated the federal Fair Housing Act and Rehabilitation Act by enforcing the City's zoning code to limit the number of residents in two group homes for recovering substance abusers. We conclude the City acted lawfully.

Oxford House-C and Oxford House-W are self-supporting, self-governing group homes for recovering alcoholics and drug addicts in the City of St. Louis. The Oxford Houses provide a family-like atmosphere in which the residents support and encourage each other to remain clean and sober, and immediately expel any resident who uses drugs or alcohol. The Missouri Department of Mental Health, Division of Alcohol and Drug Abuse (DMH/ADA), helped establish the Oxford Houses and provides them with technical support. The houses also receive assistance from Oxford House, Inc., a national organization of Oxford Houses across the country.

Oxford House-C and Oxford House-W are located in St. Louis neighborhoods zoned for single family dwellings. The city zoning code's definition of single family dwelling includes group homes with eight or fewer unrelated handicapped residents. St. Louis, Mo., Rev. Code tit. 26, § 26.20.020(A)(1) (1994). After city inspections revealed that more than eight recovering men were living at each Oxford House, the City cited the houses for violating the eight-person limit.

Rather than applying for a variance excepting them from the eight-person rule, the Oxford Houses, the DMH/ADA, and

Oxford House, Inc. (collectively Oxford House) brought this lawsuit against the City, contending the City's attempt to enforce the rule violated the Fair Housing Act, as amended, 42 U.S.C. §§ 3601-3631 (1988), section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a) (1994), and other federal laws. The City brought a counterclaim asking the district court to enjoin the Oxford Houses from violating the City's ordinances. Holding the City had violated the Fair Housing Act and the Rehabilitation Act by enforcing the eight-member limit against the Oxford Houses, the district court enjoined the City from using its zoning code to prevent the Oxford Houses from operating with their existing number of residents, ten in Oxford House-C and twelve in Oxford House-W. The district court also denied the City's counterclaim. *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1584 (E.D. Mo. 1994). The City appeals. We reverse the judgment for Oxford House, vacate the injunction, and remand the counterclaim for further consideration.

We first review the district court's decision that the City violated the Fair Housing Act. Attempting to avoid the Act's requirements altogether, the City contends Congress exceeded its authority under the Commerce Clause by prohibiting handicap discrimination in the 1988 amendments to the Act. We disagree. Congress had a rational basis for deciding that housing discrimination against the handicapped, like other forms of housing discrimination, has a substantial effect on interstate commerce. *See Morgan v. Secretary of Hous. & Urban Dev.*, 985 F.2d 1451, 1455 (10th Cir. 1993). We also reject the City's contention that under 42 U.S.C. § 3607(b)(1), the City's limits on the number of unrelated people who can live together in a single family residential zone are exempt from the Act's requirements. The Supreme Court recently held § 3607(b)(1) only exempts total occupancy limits intended to prevent overcrowding in living quarters, not ordinances like the City's that are designed to promote the family character of a neighborhood. *City of Edmonds v. Oxford House. Inc.*, 115 S. Ct. 1776, 1779 (1995). In short, the City must comply with the Act.

The Act prohibits the City from making a dwelling unavailable to handicapped people on the basis of their handicap. 42 U.S.C. § 3604(f)(1). In fact, the Act requires the City to make reasonable accommodations in its generally applicable zoning ordinances when necessary to give a handicapped person "equal opportunity to use and enjoy a dwelling." *Id.* § 3604(f)(3)(B); *Smith & Lee Assocs.. Inc. v. City of Taylor*, 13 F.3d 920, 924 (6th Cir. 1993). The Act also prohibits the City from interfering with handicapped individuals' exercise of their equal-housing rights. 42 U.S.C. § 3617. The City does not contest the district court's conclusion that the Oxford House residents are handicapped within the meaning of the Fair Housing Act because they are recovering addicts. The issue is whether the City has unlawfully discriminated against, failed to accommodate, and interfered with the housing rights of these handicapped men.

Rather than discriminating against Oxford House residents, the City's zoning code favors them on its face. The zoning code allows only three unrelated, nonhandicapped people to reside together in a single family zone, but allows group homes to have up to eight handicapped residents. St. Louis, Mo., Rev. Code. tit. 26, §§ 26.08.160, 26.20.020(A)(1) (1994). Oxford House's own expert witness testified Oxford Houses with eight residents can provide significant therapeutic benefits for their members. The district court nevertheless found the City's zoning ordinances are discriminatory because the eight-person limit would destroy the financial viability of many Oxford Houses, and recovering addicts need this kind of group home. Even if the eight-person rule causes some financial hardship for Oxford Houses, however, the rule does not violate the Fair Housing Act if the City had a rational basis for enacting the rule. *Familystyle of St. Paul. Inc. v. City of St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991).

We conclude the eight-person rule is rational. Cities have a legitimate interest in decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unre-

lated people who may occupy a single family residence are reasonably related to these legitimate goals. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). The City does not need to assert a specific reason for choosing eight as the cut-off point, rather than ten or twelve. "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." *Id.* at 8. We conclude the City's eight-person restriction has a rational basis and thus is valid under the Fair Housing Act. *Familystyle*, 923 F.2d at 94.

The district court found the City discriminated against the Oxford Houses by singling them out for zoning inspections and enforcement proceedings because of the residents' handicap. This finding is clearly erroneous because Oxford House did not show the City ignored zoning violations by nonhandicapped people. *See* Fed. R. Civ. P. 52(a). Although Oxford House presented evidence that the City did not take action against certain groups of more than three unrelated, nonhandicapped people residing together in single family zones, Oxford House did not show that these other groups were not entitled to reside in single family zones based on the zoning code's exception for valid pre-existing uses. *See* St. Louis, Mo., Rev. Code tit. 26, §§ 26.16.050-.060 (1994). At any rate, Oxford House did not show anyone in the building inspector's office knew of the alleged zoning violations. The parties agree the City never received complaints about the groups Oxford House claims were violating the zoning code.

Having concluded Oxford House did not show the City treated the Oxford Houses differently from any other group, we believe the City's enforcement actions were lawful regardless of whether some City officials harbor prejudice or unfounded fears about recovering addicts. Because the district court found the City's actions were motivated by bias and stereotypes, however, we will briefly discuss the evidence of discriminatory intent. At

trial, Oxford House presented testimony that one of the Mayor's assistants stated Oxford Houses might cause flight from the City. Also, when Oxford House's counsel asked the City's Zoning Administrator whether he would want to live next door to an Oxford House, the Zoning Administrator said no and expressed concern about transiency and property values. We do not believe these isolated comments reveal City officials enforced the zoning code against the Oxford Houses because of the residents' handicap, especially considering the Oxford Houses were plainly in violation of a valid zoning rule and City officials have a duty to ensure compliance. Oxford House also presented evidence that the inspectors who visited the Oxford Houses were aware of community opposition to the houses and hoped to discover zoning violations. Because the inspectors do not hold policymaking positions, their conduct and remarks tell us little about why City officials decided to take action against the Oxford Houses. Anyway, the district court took the inspectors' actions and comments out of context. Overall, we conclude the district court committed clear error in finding the City enforced the zoning code against the Oxford Houses because the residents are recovering addicts. We find no unlawful discrimination under the Fair Housing Act, either in the eight-person limit or in the City's enforcement activities.

Also, the City did not fail to accommodate the Oxford Houses as the Act requires. *See* 42 U.S.C. § 3604(f)(3)(B). The Oxford Houses want the City to let them operate with more than eight residents. The City has consistently said it cannot make an exception to the zoning code unless the Oxford Houses apply to the City's Board of Adjustments for a variance, *see* St. Louis, Mo., Rev. Code tit. 26, § 26.84.050(D) (1994), and the Oxford Houses refuse to apply. Their refusal is fatal to their reasonable accommodation claim. The Oxford Houses must give the City a chance to accommodate them through the City's established procedures for adjusting the zoning code. *See United States v. Village of Palatine*, 37 F.3d 1230, 1233 (7th Cir. 1994); *Oxford*

*House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1261 (E.D. Va. 1993). The Fair Housing Act does not "insulate [the Oxford House residents] from legitimate inquiries designed to enable local authorities to make informed decisions on zoning issues." *City of Virginia Beach*, 825 F. Supp. at 1262. Congress did not intend for the Act to remove handicapped people from the "normal and usual incidents of citizenship, such as participation in the public components of zoning decisions, to the extent that participation is required of all citizens whether or not they are handicapped." *Id.* In our view, Congress also did not intend the federal courts to act as zoning boards by deciding fact-intensive accommodation issues in the first instance. *Id.* at 1261.

The district court decided the Oxford Houses should not have to apply for variances because the City is certain to deny their applications. *See Village of Palatine*, 37 F.3d at 1234. Oxford House presented evidence that some neighbors of the Oxford Houses have concerns and complaints about the houses, and that the alderman representing the neighborhoods where the Oxford Houses are located does not want the houses to have more than eight residents. The record shows the Board of Adjustments has granted variances despite opposition from neighbors and aldermen, however. Having carefully reviewed the record, we conclude the district court committed clear error in finding it would be futile for the Oxford Houses to apply for variances. Thus, the Oxford Houses must apply if they want the City to accommodate them. We express no opinion about whether the Fair Housing Act would require the City to grant variances for the Oxford Houses if they apply.

Because the City did not unlawfully discriminate against the Oxford House residents or refuse to accommodate them, the City did not interfere with the residents' equal housing rights by enforcing the eight-person rule against them, *see* 42 U.S.C. § 3617. Further, because the City did not limit the number of Oxford House residents "solely by reason of [their] disability"

and the residents did not request an exception to the eight-person limit, the City did not violate the Rehabilitation Act. *See* 29 U.S.C. § 794(a); *Lue v. Moore*, 43 F.3d 1203, 1206 (8th Cir. 1994). Having concluded the City acted lawfully, we remand the City's counterclaim seeking enforcement of its ordinances for further consideration.

In conclusion, we reverse the judgment in favor of Oxford House on the Fair Housing Act and Rehabilitation Act claims, vacate the injunction prohibiting the City from enforcing its eight-person zoning restriction against the Oxford Houses, and remand the City's counterclaim. Because Oxford House is no longer a prevailing party, we also reverse the award of fees and costs to Oxford House. 42 U.S.C. § 3613(c)(2).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-2402-C(7)
(CDP)

OXFORD HOUSE-C, et al.,
Plaintiffs,

v.

CITY OF ST. LOUIS,
Defendant.

## JUDGMENT AND ORDER

[Filed: Jan. 28, 1994]

In accordance with the Memorandum Opinion entered in this case and filed contemporaneously herewith, which is incorporated by reference herein,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that plaintiffs shall have judgment against defendant on plaintiff's first amended complaint and on defendant's counterclaim, and that defendant's counterclaim is dismissed on the merits.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that defendant The City of St. Louis is **PERMANENTLY ENJOINED** from enforcing its zoning ordinance to prevent plaintiff Oxford House-C from operating with ten (10) unrelated handicapped residents at its current location or to prevent plaintiff Oxford House-W from operating with twelve (12) unrelated handicapped residents at its current location.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES
MAGISTRATE JUDGE

Dated this 28th day of January, 1994.

## APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 91-2402-C(7)
(CDP)

OXFORD HOUSE-C, et al.,
Plaintiffs,
v.
CITY OF ST. LOUIS,
Defendant.

## MEMORANDUM OPINION

[Filed: Jan. 28, 1994]

Plaintiffs in this case seek an injunction and declaratory judgment prohibiting the City of St. Louis from enforcing its zoning and building ordinances in a manner that would prohibit two Oxford Houses, which have ten and twelve residents, from operating within the City's single-family residence zoning districts. Plaintiffs, who represent recovering alcoholics and drug addicts, allege that the City's enforcement of its ordinances discriminates against them on the basis of their handicap in violation of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, as amended by the Fair Housing Amendments Act of 1988, and other federal laws. The matter is before the Court following a non-jury trial. Based upon the testimony, exhibits, stipulations presented at trial, and pre- and post-trial briefs, the Court makes the following findings of fact and conclusions of law.

### Findings of Fact

### I. The Parties

1. Plaintiffs Oxford House-C ("OH-C") and Oxford House-W ("OH-W") are unincorporated associations consisting of each

house's current residents, located in the City of St. Louis, Missouri. Their purpose is to provide a home for recovering (sober) alcoholics and drug addicts.

2. Plaintiff Oxford House, Inc., is a Delaware corporation with its principal place of business in Silver Springs, Maryland. Oxford House, Inc. advocates for and assists in providing housing for recovering alcoholics and addicts, and is a membership organization whose members are the residents of individual Oxford Houses across the country, including OH-C and OH-W. Oxford House, Inc., has granted charters to plaintiffs OH-C and OH-W and has expended substantial effort seeking to protect their right to supportive housing in the community. Oxford House, Inc., also has a contract with the State of Missouri for the collection of loan repayments from and provision of other assistance to individual Oxford Houses in Missouri.

3. Plaintiff-Intervenor the Missouri Department of Mental Health, Division of Alcohol and Drug Abuse is a state agency created under the Missouri Constitution, Article IV, Section 37(a) and Chapters 630 and 631, R.S.Mo. 1986, as amended. The Department of Mental Health, Division of Alcohol and Drug Abuse (hereinafter, "the Missouri Department") receives $18-22 million per year in federal alcohol and drug abuse and mental health services block grant funds under 42 U.S.C. § 300x.

4. Defendant the City of St. Louis is a municipal corporation existing and operating under a Charter recognized by Article VI, § 31 of the Constitution of Missouri. The City of St. Louis receives federal funds, including approximately $22.6 million for fiscal year 1991, $23.3 million for 1992, and $26 million for 1993, under the Community Development Block Grant (CDBG) program. The City's Department of Public Safety, which includes the Zoning Administration and the Division of Building and Inspection, receives funding from the CDBG grant.

## II. The Oxford House History

5. In 1975, Paul Molloy and several other recovering alcoholics and drug addicts formed the first Oxford House. Molloy testified that he and the others had been residing in a halfway house which faced closure by the county because of a lack of funding. The residents decided, through the encouragement and assistance of some of their compatriots and sponsors at Alcoholics Anonymous, to rent and operate the house themselves, for themselves, as none of them yet felt ready to live independently, despite the fact that they were all well into their periods of sobriety, and despite the fact that they had already lived for some time in a supervised halfway house and had received treatment for their addictions. From its inception, this first Oxford House was run differently from a typical halfway house. No staff was present at the house, and a resident could stay as long as he wished, provided he remained drug- and alcohol-free and paid his share of expenses. This model proved to be successful and Molloy expanded the concept and assisted other groups in starting other Oxford Houses around the country.

6. In 1988, Congress enacted and President Reagan signed legislation to encourage expansion of the Oxford House model for drug treatment on a nationwide scale. Pub.L. No. 100-690, 102 Stat. 4181 (November 18, 1988). As it was re-enacted in the ADAMHA Reorganization Act of 1992, the program requires all states receiving federal block grant funds for alcohol and drug abuse and mental health services to establish a revolving fund of at least $100,000.00 to make loans available to help establish group homes for recovering alcoholics and addicts. Groups of at least six recovering alcoholics or addicts who wish to live in a group home based on the Oxford House model can apply for a loan of up to $4,000.00 to cover the start-up costs of renting and equipping the home. The loans are interest-free and must be repaid by the residents of the home within two years. 42 U.S.C. § 300x-25. The statute specifically requires the homes to follow

the three basic rules of absolute sobriety and automatic expulsion, self-governance, and financial self-sufficiency.

7. The Missouri Department, through a contract with the Missouri Housing Development Commission, has established a revolving fund of $100,000.00 pursuant to 42 U.S.C. § 300x-25 to provide start-up loans not to exceed $4,000.00 to Oxford House-type residences. The Missouri Department provides staff to locate suitable housing, arrange for the initial lease, screen and accept the first residents, offer technical assistance to establish the Oxford House, and give on-going assistance to residents of the Oxford House as needed to enable the home to operate under Oxford House principles. The Missouri Department also has a contractual relationship with Oxford House, Inc., for the collection, quality control, reporting, and other technical assistance associated with the loan funds awarded to Oxford House-type recovery homes under the contract with the Missouri Housing Development Commission.

8. All Oxford Houses share the same three basic rules: (1) each house must be democratically self-governing; (2) each house must be financially self-sufficient; and (3) any person using drugs or alcohol must be immediately expelled from the House.

Oxford Houses are not traditional half-way houses, because they do not have any on-site staff or supervision. Oxford House, Inc. and the Missouri Department provide assistance in setting up individual houses and provide initial technical support. Once established, however, individual Oxford Houses are no longer subject to direct, ongoing control by either Oxford House, Inc., or the Missouri Department, but instead become self governed. Residents make all decisions regarding management of the house, including decisions regarding admitting and expelling members.

Members of each house share expenses equally, elect their officers, and pay dues to Oxford House, Inc. Individual Oxford Houses must support themselves, including repaying the start-up loans. In general the houses have from 8 to 15 residents; they are segregated as to sex but are intentionally integrated by race, age and economic background. There are over 450 Oxford Houses in the United States. There is no limit on the length of time a resident may remain in the house, so long as the members remain drug and alcohol free, pay their share of the expenses, and are not expelled for disruptive behavior. The average length of stay is 13 to 15 months.

9. The three basic rules of self-governance, financial self-sufficiency, and automatic expulsion upon one use of drugs or alcohol are all therapeutically based. Substantial evidence presented at trial showed that these rules foster important and valid recovery aims. The rule of absolute sobriety is based on the prevailing and well-established medical opinion that total abstinence is required for effective treatment of alcoholism or drug addiction. The requirement that the members of a home automatically expel any member found to have used alcohol or drugs reinforces the recovery of the other members as it shows them, consistent with this basic tenet of substance abuse treatment, that there are no second chances and that one mistake will result in the loss of the Oxford House resource in a person's recovery. The evidence showed that alcoholics and drug abusers frequently have lost contact with their families or mainstream society prior to their recovery, and may lack or have lost basic life skills such as budgeting, arriving at work on time, maintaining employment, cooperating with family members, and managing their own lives. The rules of democratic self-governance and financial self-sufficiency enhance self-esteem while teaching or reteaching these basic life and social skills. All members must contribute equally to the expenses of the house; this also fosters self-esteem by requiring members to care for themselves and not rely financially on others. The houses are intentionally mixed by

race, age and economic background; this reinforces the knowledge that drug and alcohol addiction are diseases that strike all segments of society. Several witnesses explained the differences in therapeutic benefit from an Oxford House type of setting as opposed to a half-way house: in a supervised setting the residents are both policed and cared for by the staff; in an Oxford House setting the members must care for themselves, and must police and provide support for one another. This dual role of mutual support and mutual-policing is based on the success shown by Alcoholics Anonymous and similar programs, which have consistently demonstrated that persons who have suffered the same problems are the best able to help others going through similar recovery efforts, both by providing a supporting and understanding environment, but also by knowing the temptations and signs of relapse, and helping others avoid such failures.[1]

10. The Missouri Department believes that a full range of treatment options is necessary for the treatment of drug and alcohol abuse, and therefore supports (and funds, at varying levels) a continuum of treatment options including inpatient treatment, supervised half-way houses, Oxford Houses, and outpatient treatment, including Alcoholics Anonymous and Narcotics Anonymous. On the continuum from inpatient treatment to independent living, Oxford Houses provide a final stop for those not quite ready to face alone the risks of independent living. In general, Oxford House residents are well along the recovery path at the time they enter the Oxford House. They usually have undergone one or more treatment programs and have had some period of sobriety before entering the Oxford House. Often they come from inpatient treatment centers or half-way houses.

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[1] In large part, there was no dispute at trial as to the therapeutic benefit of the Oxford House program or the appropriate treatment modalities for drug and alcohol addiction.

The evidence showed that there are almost 300,000 individuals in the State of Missouri who abuse alcohol and/or drugs, including over 100,000 in the eastern region of the state and almost 30,000 in the City of St. Louis. According to the Director of the Missouri Division of Alcohol and Drug Abuse, there is a tremendous need for Oxford Houses in the treatment continuum for alcoholics and addicts in the St. Louis area and across the state.

11. Under the Oxford House program, individual Oxford Houses are located in clean, drug-free, residential neighborhoods that will provide residents with a sense of pride and self-worth. Although it is not possible to find neighborhoods where there are no liquor stores or taverns, as they are everywhere, the program seeks to find neighborhoods that are not dominated by bars and liquor stores. It is important to locate the houses in areas that are relatively free of drug-dealing, because of the temptations that the presence of open drug trafficking can create. The houses should not be isolated in industrial areas away from other neighbors, as location in good neighborhoods plays a crucial role in an individual's recovery and re-entry to society by promoting self-esteem and helping to create an incentive not to relapse. Additionally it is helpful if the houses can be located in neighborhoods with good access to public transportation and AA/NA meeting sites.

The program prefers to use larger single-family houses, as this provides the family atmosphere desired, and because cooperative living is required. The members of each house are expected to share kitchen facilities and to share in the cleaning and upkeep of the house and yard. In almost all Oxford Houses, including those at issue here, the residents are required to share a bedroom, and no locks are allowed on bedroom doors, in order to avoid the possibility that one member could become withdrawn from the group and face a greater risk of relapse. Apartments obviously do not meet these goals of cooperative living and having a large

group to provide support. Smaller houses are unsatisfactory because they cannot hold as many residents.[2]

12. Since 1989, the Missouri Department has helped to establish twenty-seven Oxford Houses in Missouri, including nineteen homes for men, six for women, and two for women with children. In 1990 representatives of the Missouri Department met with William Kuehling, special assistant to the Mayor of the City of St. Louis, to discuss the Oxford House concept and to ask for the City's assistance in locating Oxford Houses in the City. Mr. Kuehling expressed some skepticism about the concept, explaining to the state officials that his job was to keep people from leaving the City and that Oxford Houses might cause more people to flee to the suburbs. The representatives from the Missouri Department left this meeting believing that the City would not provide them with any assistance, and they accordingly have never notified any City official prior to the opening of any Oxford House in the City. Six of the Missouri Oxford Houses are located in the City of St. Louis; two are located in suburbs in the St. Louis metropolitan area.

## III. Oxford House-Clayton

13. In early 1991 Nkosi Halim, a housing coordinator employed by the Division of Alcohol and Drug Abuse who had formerly been employed by Oxford House, Inc., and who is himself a recovering alcoholic and former Oxford House resident, sought sites for an Oxford House in St. Louis. He noticed

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[2] A significant amount of trial time was spent discussing the optimum or necessary number of members of any particular Oxford House. Plaintiffs' witnesses testified that the optimum number was somewhere between eight and fifteen. The state and federal law establish six as a minimum number. The defendant's current ordinance would allow a maximum of eight. The national average for all Oxford Houses is 9.7 members. Over 80% of the Oxford Houses nationwide and in Missouri have more than eight residents. This dispute is discussed in more detail at § VI below.

that the home on Clayton Road that ultimately became OH-C was for sale. It is located in an "A" single-family zoning district, although a commercial area is directly across the street and the house itself sits only a few doors from the City limit and a commercial area in the City of Clayton, Missouri. Mr. Halim believed the house to be suitable for an Oxford house because it had at least five bedrooms, was located in a stable residential neighborhood which was accessible to public transportation and was near several hospitals where AA and NA held meetings. He also believed that the amenities available in nearby Forest Park would be of benefit to the residents. He therefore entered into negotiations with the record owners of the building, the Franciscan Sisters of Mary, a religious order. The Sisters had previously used the residence as a home for nuns, and at least five nuns had lived there as recently as 1990. The Sisters indicated that they did not wish to rent the home to Oxford House, but preferred to sell it. As Oxford Houses prefer to rent, rather than own homes, Mr. Halim ultimately located Karen Myers, who entered into a lease-purchase agreement with the Franciscan Sisters of Mary and then in turn leased the property to Oxford House.

14. On or about February 26, 1991, OH-C received a start-up loan of $4,000.00 from the revolving fund established by the Missouri Department. The proceeds of that loan were used to pay for the security deposit, first month's rent, and beds and dressers for the house. In March of 1991 the first residents moved into OH-C. All were recovering alcoholics and drug addicts. Initially eleven members lived in the home; at the time of trial the house had ten members (the reduction was a result of building code requirements related to the ceiling height of a basement bedroom). OH-C functions according to the Oxford House rules. The residents share household expenses, chores and decision making. It has elected officers and weekly meetings where the house's affairs are discussed. Each resident is required to pay rent of $60 per week. Each is required to pay one week's rent in advance, as a "sobriety deposit". If the member leaves the house

after notice and in good standing, the deposit is refunded. If the member is expelled for any reason or leaves without giving notice, the deposit is not refunded.

15. Shortly after OH-C opened, the officers of a nearby neighborhood association received questions about the house, and one of the officers of the organization called the alderman for the neighborhood, Daniel McGuire, who told her it was an Oxford House. On April 22, 1991, the neighborhood association held a meeting for the purpose of discussing the Oxford House. OH-C was notified in advance of the meeting and Nkosi Halim, Joe Page, and a representative from the state appeared at the meeting and answered neighbors' questions. Concerns expressed at the meeting by the persons attending included increased crime, whether the residents are screened for criminal records[3], whether any convicted rapists lived in OH-C, and whether children would continue to be safe in the neighborhood. One person attending the meeting, who was among the most vocal, seemed primarily concerned about the amount of rent being paid and the sales price of the house.

Alderman McGuire received reports about the neighborhood meeting from one or more officers of the association. The association's board members continued to discuss Oxford House and contact Alderman McGuire for several months after the special meeting. Alderman McGuire also talked to other OH-C neighbors who expressed fears about property values, overcrowding, and the safety of neighborhood children.

16. On April 22, 1991 (the same date as the neighborhood meeting) the City's Citizens Service Bureau (CSB) received a

[3] They are not so screened. Witnesses testified that this is because many, if not most, recovering addicts or alcoholics have criminal records resulting from their behavior while using alcohol and drugs. One witness testified that part of the rationale for the lack of criminal screening is the belief that those applicants who do not have criminal records simply never got caught, as most abusers had, at a minimum violated laws regarding drunken driving.

complaint that the building rented by OH-C had "been turned into a halfway house" and had "not been inspected for Conservation District."[4] As a result of this complaint a city inspector, Paul Sims, went to the house and told the resident who answered the door that he was investigating a report that the house had been turned into an "illegal halfway house." The resident did not let him in, so he performed only an exterior inspection. Thereafter, the City sent a violation letter to the Franciscan Sisters[5] informing them that they needed to obtain an occupancy permit, because the building was being used for an "institutional group use." According to the City's evidence, this violation notice was "abated" because Mr. Sims later concluded (for some reason that is not clear from the evidence), that only four people were living in OH-C and therefore no institutional use occupancy permit was needed. However, there is no evidence that the Franciscan Sisters or the residents of OH-C were notified that this violation notice had been "abated," and, in any event, the issue was turned over to the City's Building Division.

17. When the Franciscan Sisters were informed that OH-C had been cited for City ordinance violations, they notified OH-C; Nkosi Halim then contacted the City, speaking to Walter Murphy of the Building Division. Halim told Murphy what the OH-C was, sent him information about Oxford Houses, and asked that he be contacted about any further problems. Murphy, however, did not contact Halim, but instead sent follow-up violation notices to the record owners, the Franciscan Sisters, informing them that OH-C was operating in violation of the City's zoning code. Murphy continued to investigate OH-C, after discussing the case with his supervisors. He and inspector

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[4] 0H-C is not located in a "conservation district", so no inspection for this purpose was required.

[5] The Franciscan Sisters were still the owners of record of OH-C because the term of the lease under the lease-purchase agreement with Karen Myers had not yet been completed.

Martin Wente went to OH-C at least four times, but only inspected the interior on one occasion. After that inspection, the City notified the Sisters, by letter dated July 18, 1991, of the following claimed violations:

(1) the basement bedroom had a ceiling height of less than 7'4", as required by city code ES 404.4;[6]

(2) the window areas in the basement bedroom were insufficient as they must be at least 8% of the floor area, under ES 401.2; and

(3) "Does not conform to A single-family dwelling district use; Illegal use of premise, cease illegal use. Ord. 59979."

Thereafter various discussions between the parties ensued, which culminated in the City's filing an information in the Municipal Division of the Circuit Court of the City of St. Louis, charging the Franciscan Sisters of Mary with the same three violations. That information was held in abeyance pending resolution of the instant law suit. As a result of the building code violation citations, OH-C removed a cover over a window, resolving the window area dispute, and ceased using the basement room as a bedroom.[7] OH-C never applied for a variance under the City's zoning code.

18. In pursuing the "halfway house" complaint regarding OH-C, Mr. Murphy was aware of community opposition to the

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[6] St. Louis has adopted the BOCA Existing Structures Code, Second Edition, as published by the Building Officials & Code Administrators, Inc., as its Existing Structures Code, which will be referred to here by the City's "ES" citations or as "BOCA."

[7] 0H-C presented evidence, by way of expert testimony, that the ceiling height in this area could be modified to provide for a height of 6'9", which, in the opinion of plaintiff's expert, was ample ceiling height for a bedroom, although not in compliance with the BOCA code. OH-C actually applied for a building permit to make this change, which was denied.

Oxford House, from discussions he had with David Bohm, associate city counselor, and other city officials. According to Mr. Murphy, the neighbors did not have complaints about specific problems, but "concern for the idea that a drug rehab house was in their neighborhood." Murphy also felt that there was concern because OH-C had a "multiracial population." The decision to cite OH-C for violation of the zoning code was actually made by Edward Dobbs, the City's Zoning Administrator. Murphy told Dobbs that the property was some sort of drug rehab center and asked Dobbs "if we were heading in a right direction if we found overcrowding, if that's what we could use." During his deposition, Mr. Dobbs testified that he "wouldn't want them living next door to him". His explanation for this comment, when ordered by the Court to answer follow-up questions, included common, stereotypical fears such as safety, transiency, and a negative effect on property values.

## IV. Oxford House-Westminster

19. On or about April 17, 1992, OH-W received a start-up loan of $4,000.00 from the revolving fund established by the Missouri Department. The proceeds of that loan were used to pay for the security deposit, first month's rent, and beds and dressers for the house. OH-W is located in the Central West End area of the City of St. Louis, and is on a residential street, zoned "A" single-family. It is located on Westminster Avenue, but is a only few houses from Euclid Avenue, which is a restaurant and commercial area. The house has three stories, including six bedrooms and three bathrooms. The Missouri Department learned of the house when someone who knew about the Oxford House program contacted the state and indicated they had a potential house available. The Missouri Department negotiated with the potential owner of the building, and when an agreement on rent was reached the person purchased the building, which had been for sale, and then rented it to Oxford House. The three year lease provides for rent the first year of $1250 per month, with an escalation clause of $25 per month per year.

20. OH-W opened on May 1, 1992, the same day the lease was signed with the new homeowner. Joe Page, an employee of the Missouri Department who is also a former Oxford House resident, was assigned to assist the initial residents of the home, and lived there for several months. At approximately 10:00 a.m. on the day the house opened, Mr. Page answered the doorbell; two men asked him what the Oxford House was. Mr. Page spent several minutes explaining the concept to them and provided them with an informational pamphlet. The neighbors expressed surprise that an Oxford House could operate in a single-family neighborhood; one of the men indicated that he had worked in the alcoholism treatment field and knew who would be living there; the other stated that the area was a conservation district and that a special permit was needed for operation in the district; one of the men expressed concern to Joe Page about the safety of the neighborhood and whether he could allow his daughters to play outside if the Oxford House operated in the neighborhood (expressed by this neighbor at trial as the "normal concerns that any father would have"). Later that evening Mr. Page observed a group of six to eight people gathered outside the house across the street from OH-W; they appeared to be gesturing toward the house. Mr. Page found this intimidating, and left the house through the back door.

21. The next day, May 2, 1992, the neighborhood group that included the houses surrounding OH-W held their annual alley clean up and picnic, at which time several residents expressed concerns about the opening of OH-W to their alderman, Daniel McGuire (the same alderman in whose ward OH-C is located). McGuire sent a letter, dated May 1, 1992, to the president of the Central West End Association citing the zoning code and state statute, discussing the ownership of OH-W, and stating that federal law required that OH-W must be treated as a single family under state and federal law, so long as it had fewer than nine residents. The letter also enclosed a copy of the original complaint in this suit, and expressed the hope that OH-W could

be added to the lawsuit. At trial Alderman McGuire denied preparing this letter in anticipation of OH-W's opening, and testified that he believed he had actually mailed the letter after the clean-up and picnic of May 2. He could not recall if he had received advance notice of the opening of OH-W. Alderman McGuire testified at trial that he believed, in May of 1992, that the City Ordinance did not allow more than three unrelated individuals to live together. He testified at his deposition that he believed the City ordinance limiting unrelated persons to three in single-family districts was appropriate. Alderman McGuire provided no explanation for his contrary statements regarding the legality of the three-person restriction contained in his May 1 letter.[8]

22. Some time after OH-W opened, a representative of Oxford House, Inc. spoke with building inspector Murphy and with City Counselor Bohm about OH-W, and asked that it be allowed to operate with 11 or 12 residents. The City took the position that the request should be handled as an application for a variance under the City's zoning ordinances; Oxford House took the position that it should not be required to participate in variance or conditional use applications. Although there was substantial dispute about this at trial, the Court finds that the parties agreed that the appropriate mechanism for dealing with the alleged violations was for the City to inspect the premises, cite OH-W for the zoning violations, and then OH-W would be joined in the instant suit. That is, in fact, what occurred, and OH-W was joined as a plaintiff by amendment of the complaint in this case. Had it not been so joined, it is clear that the City would have proceeded with enforcement actions regarding the zoning violations.

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[8] The alderman's confusion on this issue is not entirely surprising, given the evidence that none of the City housing inspectors or building or zoning officials who testified (and presumably none of the aldermen) have ever received any training regarding discrimination in housing practices.

## V. The City Ordinances

23. Title 26 of the Revised Code of the City of St. Louis is the Zoning Code of the City of St. Louis, and consists of a codification of various ordinances enacted at different times. The Zoning Code divides the City into districts, denominated "A" through "L". Section 26.12.010, as amended. Like many Zoning Codes, the St. Louis code is a pyramid-type code, with the activities allowed in each district also being allowed in the next lower group. For example, the "A" single-family residence district is the most restrictive, and allows only single-family residences, with certain exceptions, in that district. All uses allowed in "A" districts are also allowed, however, in almost all of the *remaining* districts, including B, C, D, E, F, G, H, I, K, and L. (J is an industrial district which provides limitations on dwellings.)

24. The Zoning Code defines "family" to mean "a person, or group of persons immediately related by blood, marriage, or adoption living as a single housekeeping unit; also a group of not more than three (3) persons not necessarily related by blood, marriage, or adoption, living as a single housekeeping unit." Section 26. 08 .160 .

25. At the time OH-C opened, the Zoning Code restricted dwellings in the "A" single-family residence district to single-family residences, that is, to "families" as defined in the code. Thus, OH-C, or any group home for disabled individuals consisting of more than three unrelated individuals, was not allowed as of right in any single-family, or any other residential, district of the City of St. Louis. Moreover, at that time, a group home for the disabled with more than three unrelated individuals was not listed as a conditional use in the single-family district. Such a group home could only have been allowed as of right in the "I" Central Business and "L" Jefferson Memorial districts.

After this suit was filed, but before OH-W opened, the City amended its Zoning Code to comply with state law (*see* § 89 . 020

. 2 R.S.Mo. ), by passing Ordinance 62588, which was approved on April 7, 1992 . That ordinance amended § 26 . 20 . 020 to provide that a group house in which eight or fewer unrelated mentally or physically handicapped persons reside (which may also include two additional persons acting as house parents or guardians), may exist as of right in "A" single-family districts, and in all other districts where "A" uses are also authorized.

The amended Zoning Code still provides that group homes in which nine or more unrelated handicapped persons live are permitted as of right only in "I" Central Business Districts, and the "L" Jefferson Memorial District. Under the amended code such group homes are permitted as conditional uses only in "D" Multiple-Family Dwelling Districts, in "E" Multiple-Family Dwelling Districts, "F" Neighborhood Commercial Districts, "G" Local Commercial and Office District, and "H" Area Commercial Districts. Thus a variance would still be required for an Oxford House with more than eight persons to locate in the "A", single-family, "B", two-family, or "C", multiple-family dwelling districts, and a conditional use permit is required for an Oxford House with more than eight persons to operate in the "D" through "H" districts.

Although Alderman McGuire was the sponsoring alderman of the above-described amendment to the zoning ordinance passed in April of 1992, he claimed at trial to have learned of it only in January or February of 1993, and claimed that he was not aware of it at the time he wrote his letter to the Central West End Association regarding OH-W in May of 1992. He did recall that he had sponsored a "bed and breakfast" ordinance that took effect in April of 1992. In fact, the amendment at issue, Ordinance 62588, also established that a bed and breakfast could be operated as a conditional use in a single-family district, and provided that two baby-sitting centers per block could be located in a single-family district, as of right. Ordinance 62589, effective the same day and also sponsored by Alderman McGuire, established special "bed and breakfast districts."

26. "Conditional uses" under the Zoning Code are not allowed as of right in particular zoning districts; the Zoning Code states that such uses may be allowed when they "may be made compatible or appropriate by attaching certain conditions to their development". Section 26.80.010. According to the ordinance, a conditional use may be granted only if the use is determined, after public hearing, to be not detrimental to public health, safety, morals or general welfare, not to impair property values of the neighboring property, will contribute to, enhance and promote the general welfare and convenience of the specific location, will complement or be compatible with the surrounding uses, and will conform in all other respects to the other applicable zoning regulations.

Section 26.84.010 establishes a board of adjustment which has jurisdiction to consider appeals from aggrieved persons and which is empowered, "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the Zoning Code, to vary or modify the application of any of the regulations or provisions of such code . . . so that the spirit of the code shall be observed, public safety and welfare secured [and] substantial justice done." § 26.84.050-D. In other words, the Board of Adjustment has the power to grant variances from the zoning code, and can consider appeals from denials of conditional use applications.

Public notices must be given for hearings to consider either conditional use applications or applications for variances. These notices are required to be posted prominently on the premises as well as in the neighborhood where the property involved is located, and must be published in a newspaper of general circulation. Any member of the public may attend the meetings and be heard, and the alderman is notified of the request and is usually asked to provide a statement of support or opposition. In some circumstances either the alderman or other city officials solicit statements of support or opposition from neighborhood

groups. Although not stated in the ordinance, a representative of the person requesting the variance or conditional use must appear at the hearing, although counsel is not required, nor is the applicant required to appear personally.

Both plaintiffs and defendants presented expert witnesses who explained both the theory of zoning ordinances, what they were supposed to mean and how they are supposed to operate, and also how the codes are often implemented in practice. Additionally, several fact witnesses testified about how the St. Louis Zoning Code variance and conditional use practice actually operates. From that testimony it is clear that the reality, at least in the City of St. Louis, has little to do with the theory behind zoning codes. The experts agreed that conditional uses are those that should be allowed in a district, but may need to have conditions imposed on them to prevent adverse impact; variances, however, should not be granted for "uses" that are not allowed either as of right or conditionally, but should be reserved for alleviation of hardships that would prevent otherwise approved uses taking place, such as varying the parking requirements, building set-back limits or building height requirements. In other words, the credible evidence presented by the experts showed that if a specific use (such as a group home for more than eight residents) is not listed as a conditional use in a given district, the variance process should not be used to allow such a use, as this would constitute "spot zoning," which zoning codes are intended to prevent. The credible evidence showed that, under zoning theory, "use variances" should not be granted, because the legislative body, by not listing something as a conditional use, has already determined that such a use should not be allowed in that particular zoning district.

The St. Louis Zoning Code is clearly written with these goals in mind, but the practice shown by the evidence is quite different. The evidence showed that variances and conditional uses are routinely granted or denied based almost entirely on neighborhood and alderman approval or opposition, and not on an

analysis of whether the legislative zoning scheme is furthered. Where there is little opposition to a proposed use, whether it is consistent or inconsistent with the intent and purpose of the zoning code, either a variance or conditional use (whichever may be needed to approve the use) will be granted. Where either the neighborhood or the alderman opposes a variance or conditional use, it has only a slim, albeit not impossible, chance of being granted, again with little regard to the factors set forth in the zoning code.

27. The zoning experts presented by the parties testified about the impact that group homes such as the Oxford Houses at issue here have on neighborhoods. Numerous studies have been done on the impact of group homes on their surrounding neighborhoods, including studies of group homes occupied by more than eight residents, group homes occupied by developmentally disabled adults, group homes occupied by recovering alcoholics and addicts, as well as group homes occupied by other "less desirable" occupants such as prison pre-parolees, the seriously mentally ill, and dangerous juveniles. Those data show that group homes with nine or more residents do not have a negative impact on residential character. Most of the studies have focused on impact on property values, and have shown that there is no impact on such values. The studies have also shown that the presence of group homes has not had an impact on crime, safety, traffic, utilities, noise, or parking. The experts for both sides agreed that group homes are residential uses compatible with residential neighborhoods.

28. The only evidence that the presence of OH-C and OH-W had affected their respective neighborhoods was that OH-C had requested that the City install an extra dumpster in the alley behind that house, and that OH-W residents had been concerned about the availability of parking. The installation of the additional dumpster alleviated any problems that may have been caused by the presence of ten residents in OH-C. OH-W, because it is near a popular restaurant and commercial area, is in an area

with long-standing parking problems. After the parking problem became apparent to them, the OH-W residents agreed among themselves that no more than four members would park cars on their street, and other members must park some distance away. The evidence showed that this had resolved any parking problem, and, in any event, all the evidence showed that the parking problems on the OH-W street had predated the opening of that home.

29. St. Louis's Existing Structures Code places certain person-per-bedroom or person-per-square-foot limitations on all residences. OH-C and OH-W at their current levels of occupancy comply with those standards. OH-C, when it had eleven residents, including one who stayed in a basement bedroom, violated ES 404.4, the ceiling height restriction. This violation has been cured by OH-C's ceasing to use that area as a bedroom. The other building code violation for which OH-C was cited, involving window areas in the basement, was cured by the simple expediency of removing plywood covers from the basement windows. The evidence showed that the latter was probably not a violation of the code, as artificial light was adequate, and that both alleged violations had been in existence when the Franciscan Sisters occupied the property, but they had never been cited. Both OH-C and OH-W are currently in full compliance with the City's building codes. The evidence also showed that the City enforces its building code with regard to interior violations only when it receives a complaint or is inspecting the premises for some other reason.

## VI. Financial Viability

30. As mentioned previously, a great deal of evidence at trial was devoted to the appropriate size of an Oxford House, both from a therapeutic and from a financial viewpoint. The City ordinance obviously would allow either of these Oxford Houses to continue to operate as of right so long as they had no more than eight residents. It is the position of the plaintiffs, however, that

these houses could not survive with only eight residents, and that limiting any Oxford House to eight residents violates federal law. The City argues that affordable housing could be found that would allow Oxford Houses to meet their goals with only eight members, and that OH-C and OH-W in fact are simply paying too much rent for their properties and spending too much money on non-necessity items. From all the evidence presented, the undersigned finds as follows with respect to this size/financial viability issue .

Clearly, Oxford Houses should not have fewer than six members to provide the necessary therapeutic value, and the optimal size is somewhere between eight and fifteen residents. The five and six bedroom homes here were rented for $1200 and $1250 per month, respectively. Both leases contain escalation clauses, indicating that the rents can be expected to go up in the future. These rents are not excessive for the size and condition of the houses provided in the locations provided, and these houses and locations meet the Oxford House goals of being good houses in established, middle-class neighborhoods, near transportation and readily accessible to AA and NA meeting sites.

The residents of OH-C and OH-W each pay $60 per week as rent, which, of course, covers more than the rent paid to the landlord, and includes such things as utilities, maintenance and general household supplies. This $60 figure is the minimum reasonably necessary to support each house if OH-C maintains ten members and OH-W maintains twelve members. The $60 figure is also the maximum, or near the maximum, that the typical resident of an Oxford House in the St. Louis metropolitan area can be expected to pay.[9] The evidence showed that neither

[9] Although several of the current residents of each house could pay more, the evidence showed that for new residents even paying this amount is difficult. The $60 figure is a reasonable minimum that a person entering an Oxford House in St. Louis could be expected to pay, given the types of jobs typically available to addicts and alcoholics at the stage of recovery of a typical new Oxford House resident.

of these houses could survive financially with fewer members, and the members could not reasonably be expected to pay more.[10] The City argues that smaller houses could be found in acceptable locations that could be afforded by only eight residents, but this argument is not supported by the evidence presented, which clearly established that these Oxford Houses could not survive with eight members. The evidence did show that there is an ample supply of five to six bedroom rental houses available in good neighborhoods like those at issue here that rent in the $1200 to $1300 range, and that would be appropriate for Oxford Houses in the ten to twelve member range.

**Conclusions of Law**[11]

Plaintiffs base their claim on the federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Housing and Community Development Act of 1974, 42 U.S.C. §§ 5301 *et seq.*, the equal protection guarantee of the Fourteenth Amendment, and 42 U.S.C. 5 1983. The Court has jurisdiction of this action under 28 U.S.C. §§ 1331 and 1343(3) and (4) and 42 U.S.C. § 3613. The undersigned has authority to decide this case by virtue of 28 U.S.C. § 636(c). Plaintiffs seek a declaratory judgment providing that the City's zoning and building code enforcement with respect to the Oxford Houses violates the plaintiffs' rights under the statutory and constitutional provisions cited above. They also seek an injunction providing that the City be permanently enjoined from enforcing

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[10] The Court rejects the City's arguments that either house at issue here spent its money extravagantly or on unnecessary frills. The evidence showed that the houses spent their money on necessities and on the minimum amenities, such as telephone service and cable television, enjoyed by most working class or middle class families.

[11] To the extent that these conclusion of law, or the earlier findings of fact, may contain mixed findings of fact and conclusions of law, they are intended to comply with the requirements of Rule 52, Federal Rules of Civil Procedure.

its zoning and building codes with respect to the Oxford Houses, and seek attorneys fees and costs under the statutes.[12]

## I. Fair Housing Act

### A. Standing

As an initial matter, the Court notes that defendant has challenged the standing of Oxford House, Inc., but has not challenged the standing of the individual Oxford Houses or their residents. It is clear that the residents of OH-C and OH-W are recovering alcoholics and addicts, and are therefore persons with handicaps within the meaning of 42 U.S.C. §§ 3602 (h), 3604 . *See United States v. Southern Management Corp.*, 955 F.2d 914 (4th Cir. 1992); *Oxford House. Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 459 (D.N.J. 1992); *United States v. Borough of Audubon*, 797 F. Supp. 353, 358-59 (D.N.J. 1991); *see also* 24 C.F.R. § 100.201 (1990). The individual Oxford Houses are the direct objects of governmental action that will injure them and that a favorable judgment in this matter would redress, and so they also meet the test for standing under *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2137 (1992).

Defendant argues that Oxford House, Inc. lacks standing to bring the instant lawsuit. The United States Supreme Court has given standing under the Fair Housing Act the broadest possible definition consistent with Article III. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U. S. 91, 98 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). Community residents and fair housing organizations are permitted to bring suit and obtain relief . *See Havens*, 455 U.S. at 379 ; *Growth Horizons . Inc. v. Delaware County*, 983 F.2d 1277, 1281-82

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[12] Plaintiff-Intervenor originally sought a slightly broader declaration and injunction, but subsequently joined in the First Amended Complaint at issue here, and therefore seeks the same relief sought by plaintiffs.

(3rd Cir. 1993); *Hope. Inc., v. County of DuPage*, 717 F.2d 1061, 1074 (7th Cir. 1983).

Oxford House, Inc. has individual standing to bring the instant lawsuit. The actions taken by defendant that are alleged to be discriminatory have "perceptibly impaired" Oxford House, Inc. from fulfilling its objectives of providing fair and equal housing for persons recovering from alcoholism and drug addiction. Oxford House, Inc.'s contract with the State of Missouri for collection of start-up loan repayments and assistance to individual Oxford Houses is directly affected by the City's actions, which, if upheld, could cause the failure of the Oxford Houses at issue here and could thereby jeopardize Oxford House, Inc.'s performance of its contract with the State. Additionally, the role Oxford House, Inc. plays as legal advocate for recovering addicts and alcoholics results in a substantial drain on its organizational resources. *Cf. Havens*, 455 U.S. at 379.

### B. Constitutionality and Applicability of the Fair Housing Act

Defendant first argues that if the provisions of § 3604 apply in the manner urged by plaintiffs here, the statute is unconstitutional. Defendant raised this issue in its motion to dismiss and to strike plaintiff's first amended complaint, which was denied without prejudice, and reiterated it in its post-trial brief. The Court allowed the United States to intervene under Rule 24(a), Fed. R. Civ. P., for the purpose of challenging this assertion of unconstitutionality, and the United States has filed a brief in support of the statute's constitutionality.[13]

The Court agrees with the United States that the constitutionality of the 1988 amendments to the Fair Housing Act cannot be

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[13] The United States was also allowed to file an amicus brief in opposition to the defendant's argument regarding the applicability of the "maximum occupants" exemption in § 3607.

seriously questioned. Congress has broad power under the commerce clause to regulate activities that affect interstate commerce. *See. e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77, 281 (1981). A court reviewing legislation "must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding." *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17 (1990), *quoting Hodel*, 452 U.S. at 276. Here Congress determined, in 1968 when it passed the original Fair Housing Act, that discrimination in housing affected interstate commerce. When Congress passed the 1988 amendments, it did no more than extend the prior determination of the effect of housing discrimination on interstate commerce to other forms of housing discrimination. If housing discrimination on the basis of race and other factors affects interstate commerce, such discrimination on the basis of handicapped status also clearly is within Congress's commerce power. *See Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034-35 (11th Cir. 1992) (upholding constitutionality of 1988 amendment provisions prohibiting discrimination based on familial status); *see also Russell v. United States*, 471 U.S. 858, 862 (1985) ("the rental of real estate is unquestionably . . . an activity" affecting interstate commerce).

Defendant next argues that its actions are exempt from the coverage of the Fair Housing Act by virtue of 42 U.S.C. § 3607(b)(1), which exempts "reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." Defendant contends that its single-family restriction of not more than three unrelated individuals, in the old ordinance, or not more than three unrelated individuals or eight handicapped individuals with two unrelated caretakers, in the new ordinance, are simply reasonable local restrictions on the "maximum number of occupants" allowed to reside in a dwelling in the single-family district. Neither the old nor the new ordinance, of course, places any limit on the total number of

individuals who may occupy a dwelling, as a related family of six or sixteen or twenty-six individuals would be allowed, although only three unrelated non-handicapped or ten unrelated handicapped persons and their caretakers would be allowed.[14]

The legislative history of the 1988 Fair Housing Act amendments, which first added discrimination against the handicapped as a prohibited form of housing discrimination, indicates that Congress intended those amendments to:

> prohibit special restrictive covenants or other terms or conditions, or denials of service because of an individual's handicap *and which have the effect of excluding. for example. congregate living arrangements for persons with handicaps.*

H.R. Rep., No. 171, 100th Cong., 2d sess. 19, reprinted in 1988 U.S. Code Cong. & Admin. News 2173, at 2184 (hereafter referred to as "House Report") (emphasis added). The House Report goes on to discuss the specific § 3607 exemption raised here as follows:

> A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to *all* occupants, and did not operate to discriminate on the base of race, color, religion, sex, national origin, handicap or familial status.

*Id.* at 2192 (emphasis added). Thus, the legislative history on the one hand explicitly recognized the need for congregate housing

[14] Although defendant has argued this is a reasonable restriction because of the very nature of a family, which defendant posits normally includes parents and children, the ordinance does not so define a family. A biological or adopted family of two married parents and eight children could live in the A district, but a family consisting of two married parents, three biological or adopted children, and five unadopted foster children could not.

for the handicapped, and then went on to stress that reasonable maximums could apply, so long as they applied equally to all occupants, without discrimination on the basis of one of the protected categories.

Exemptions to the Fair Housing Act are to be narrowly construed, and the burden of proving that an exemption applies rests with the party asserting the exemption. *See. e.g., United States v. Columbus Country Club*, 915 F.2d 877, 882-83 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2797 (1991). When the exemption contained in § 3607 is narrowly construed, it simply cannot be read to say what it does not say, and the City has not met its burden of showing that it applies here. The City's ordinance is a classic unrelated person provision of the type frequently found in zoning codes; the § 3607 exemption clearly applies not to this type of zoning code but to building and occupancy codes reasonably designed to prevent overcrowding of dwellings, such as those contained in the City of St. Louis's Existing Structures Code. The zoning ordinance here does nothing to restrict the maximum number of occupants in a dwelling; it simply restricts the maximum number of certain *types* of occupants.

Although the City's argument was accepted by the Eleventh Circuit in *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992), the undersigned agrees with the District Courts in *Oxford House. Inc. v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993), and *Parish of Jefferson v. Allied Health Care. Inc.*, 1992 U.S. Dist. LEXIS 9124 (E.D. La. June 10, 1992), that the reasoning of *Elliott* is not persuasive. *Elliott* largely based its decision on case law upholding the constitutionality of "related persons" restrictions, but, in the opinion of the undersigned, *Elliott* misinterpreted not only those cases but also the legislative history of the 1988 amendments to the Fair Housing Act.

In *Elliott* the Eleventh Circuit interpreted *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), as holding that all maxi-

mum occupancy standards are unconstitutional when applied to families. Since the Supreme Court had upheld the constitutionality of unrelated person ordinances in *Village of Belle Torre v. Boraas*, 416 U.S. 1 (1974), *Elliott* read the two cases together to say that zoning regulations limiting the number of unrelated persons, but not related persons, were lawful, and that Congress must have passed the exemption with this interpretation in mind. *Elliott* then reasoned that the § 3607 exemption would be a nullity if it only applied to overcrowding regulations, since, as the Eleventh Circuit panel read *Moore*, such regulation would be invalid if applied to families. *Elliott* then concluded that the exemption should instead be read to apply to unrelated person rules such as that at issue here. The flaw in this logic, of course, is that *Moore* did not hold that no occupancy limits could apply to families. *Moore* merely invalidated an ordinance that preferred nuclear families over extended families in single-family settings. The Supreme Court in *Moore* found that the ordinance at issue there did not promote the stated goal of preventing overcrowding, and "found significant" that the City already had a maximum occupancy provision "specifically addressed to the problem of overcrowding." *Moore*, 431 U.S. at 500 n.7. The undersigned must conclude that *Elliott* simply misinterpreted *Moore*, and will not follow it in this case. The Court also notes that the Eighth Circuit has not addressed this precise argument, but has interpreted § 3607, in a slightly different context, to mean what it says, that is, that Congress intended that a government could place reasonable limits on the number of people occupying a given amount of space. *See United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992).

Defendant also contends that it cannot be held liable because it was neither the seller nor renter of the property. Section 3604 provides that it shall be unlawful:

> (f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap . . .

> (2) To discriminate against any person in the terms, conditions or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap . . .
>
> (3) For purposes of this subsection, discrimination includes . . .
>
> > (B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to allow such person equal opportunity to use and enjoy a dwelling . . .

42 U.S.C. § 3604(f). Section 3604(f)(1)'s use of the phrase "otherwise make unavailable or deny," as well as the legislative history, makes clear that the section applies not only to sellers or landlords, but also to more sophisticated methods of denying housing such as enforcing zoning or other land use laws which have the effect of denying housing. *See* House Report, at 2185 ("The Committee intends that the prohibition against discrimination against those with handicaps to apply to zoning decisions and practices"); *see also United States v. City of Black Jack*, 508 F.2d 1179, 1183-84 (8th Cir. 1974), *cert. denied*, 442 U.S. 1042 (1975); *In re Malone*, 592 F. Supp. 1135 (E.D. Mo. 1984), *aff'd without op.* 794 F.2d 680 (8th Cir. 1986). Clearly the Fair Housing Act and its Amendments apply to the zoning enforcement decision at issue here.

### C. The § 3604 Claims As to the Zoning Ordinance

Plaintiffs urge that they have shown both intentional discrimination and discriminatory effect in the application of defendant's zoning ordinances. Plaintiffs also urge that they have shown that defendant failed to reasonably accommodate their handicap. A plaintiff may prove a violation of the Fair Housing Act by showing either intentional discrimination or discriminatory effect in the enforcement of the City's zoning codes, *see Hunting-*

*ton Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir.) *aff'd*, 488 U.S. 15 (1988) (per curiam); *City of Black Jack*, 508 F.2d at 1185 ("effect, and not motivation, is the touchstone "of a Fair Housing Act claim); *see also Familystyle of St. Paul. Inc. v. City of St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991). A violation may also be proven by showing that the City refused to make reasonable accommodations necessary to afford persons with disabilities equal housing opportunities. *See* 42 U.S.C. § 3604(f)(3)(B); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. at 461-63; *Stewart B. McKinney Foundation. Inc. v. Town Plan and Zoning Commission*, 790 F. Supp. 1197 (D. Conn. 1992).

For the reasons that follow, the Court concludes that plaintiffs have met their burden of showing that defendant's enforcement of its zoning ordinance unlawfully discriminates against them on the basis of their handicap, under all three tests.

**1. Intentional Discrimination**

To prevail on a claim of intentional discrimination, plaintiff may either present direct evidence or may attempt to prove discrimination under the standards of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Eighth Circuit has held "that the three-stage *McDonnell Douglas/Burdine* analysis applies to Fair Housing Act cases." *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8th Cir. 1993), *citing United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992). Even under a *McDonnell Douglas/Burdine* analysis, however, the fact finder still must determine that the challenged action was a result of prohibited discrimination. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Because

plaintiffs here have provided direct evidence of discrimination, the Court need not utilize the three stage *McDonnell Douglas/ Burdine* burden-shifting analysis.

Intentional discrimination can include actions motivated by stereotypes, unfounded fears, misperceptions, and "archaic attitudes", as well as simple prejudice about people with disabilities. *See School Board of Nassau County v. Arline*, 480 U.S. 273, 279 (1987). To show intentional discrimination it is not necessary that plaintiffs prove that defendant's actions were motivated by a malicious desire to discriminate. It is enough that the actions were motivated by or based on consideration of the protected status itself. *See Stewart B. McKinney Foundation*, 790 F. Supp. at 1210-11.

The evidence here showed that city officials responded to the presence of the Oxford Houses based on stereotypical fears of recovering addicts and alcoholics, and carried out their enforcement efforts in response to neighborhood and community fears and concerns about "some sort of drug rehab" house being in the two neighborhoods. In short, the evidence clearly showed that defendant's actions were motivated by consideration of plaintiffs' handicapped status. The City's reaction to the state's introduction of the concept was that Oxford Houses would cause flight from the City. The City's Zoning Administrator, who was its top zoning official, testified that he wouldn't want recovering alcoholics or addicts living next door to him. The chief building inspector sought guidance from this same Zoning Administrator by asking him if pursuing a complaint of overcrowding would be "heading in a right direction . . ., if that's what we could use" to stop the operation of the Oxford House. The first city inspection of OH-C occurred on the same day the neighborhood meeting regarding OH-C was held, in which unfounded and stereotypical fears about safety and property values were raised by the neighbors. The evidence showed that multiple inspections were conducted, and OH-C was cited for at least one non-existent (con-

servation district) violation. After suit was filed, the City belatedly amended its ordinance to comply with the minimum requirements of state law, but did so in a way that would still preclude OH-C from remaining in its single-family district. When OH-W opened, the City continued its pattern of attempting to enforce the ordinance to exclude the Oxford House and continued its pattern of responding to unfounded and stereotypical fears of the neighbors. The City alderman was able to send a letter to his constituents about OH-W the same day the house opened, expressing his hopes that the house could be prevented from operating.

Completely absent from the City's reaction was any attempt to assuage the fears expressed by the citizens: that is, rather than attempting to explain the benefits of the Oxford House program and the laws governing non-discrimination against the handicapped, the various city officials fanned the unfounded fears of the residents by assuring them that they would fight the presence of the Oxford Houses. This reaction and the City's efforts at enforcement, rather than accommodation, shows intentional discrimination.[15] "[A] decisionmaker has a duty not to allow illegal prejudices of the majority to influence the decision making process . . ." *Association of Relatives and Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 94, 104 (D.P.R. 1990). The clear inference from all the evidence presented is that if the residents of these Oxford Houses had been

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[15] Plaintiffs presented evidence regarding the City's similar reaction to other proposed facilities for handicapped individuals and to one other Oxford House, but the undersigned finds that this evidence, although persuasive regarding the City's motivation in those instances, is too attenuated from the instant situation to significantly add to the proof of intentional discrimination in this instance . Thus, the decision rendered here is not based on any finding that City officials have been involved in a lengthy and complex conspiracy to prevent all handicapped persons from living in St. Louis. Rather, the decision rendered here is based on a finding that defendant's actions toward these plaintiffs was motivated by stereotypical and unfounded fears related to these plaintiffs' handicaps.

a desirable group of nonhandicapped persons, for example, the nuns who lived in OH-C before in numbers exceeding the zoning code limits or a family including unadopted foster children, the City would not have enforced its zoning ordinance against them. The Court recognizes that the evidence of intentional discrimination in this case is not nearly so strong as in some of the cases relied on by plaintiffs, such as *Support Ministries for Persons with AIDS, Inc. v. Village of Waterford*, 808 F. Supp. 120 (N.D.N.Y 1992), where, for example, City leaders made numerous blatantly discriminatory statements at public forums and passed new ordinances for the explicit purpose of keeping handicapped persons out of their community. The fact that public officials in other cities have behaved worse, however, does not excuse the intentional discrimination shown here.

The Court is not unmindful that defendant presented significant testimony from its various witnesses and decision makers that they, like most members of our society, have had some personal involvement with alcoholism or addiction, most often through close friends or relatives who suffered from these disabilities. These witnesses all testified that they themselves held no animosity towards recovering alcoholics or addicts, and, in some cases, that they had provided support and guidance when their own loved ones were struggling with recovery. Although the Court has no doubt as to the sincerity of this testimony, it misses the mark as to whether defendant intentionally discriminated against plaintiffs in the enforcement of its zoning codes. Intentional discrimination does not require personal animosity or ill will — it is sufficient that defendant treated plaintiffs unfavorably because of their handicap. It does not matter that defendant's individual witnesses feel sympathy to plaintiffs' plight, when defendant sought to exclude plaintiffs from equal housing opportunity because of their handicap.

The Court is also aware that the State of Missouri cannot entirely escape criticism for its apparent concentration of the

Oxford Houses in the City of St. Louis, rather than in the surrounding suburban areas. From the evidence presented it appears that this was not coincidental, and may, in fact, be based on some unfair (but not necessarily unlawful) stereotyping engaged in by the State officials themselves, who may believe that City residents would be less likely to complain or to have their complaints listened to than would their more well-to-do suburban neighbors. The City's fears of flight to the suburbs are not baseless, especially in today's political and economic climate, and the Court finds the City's fear that it was being unduly singled out for an over-concentration of social service institutions has some basis in fact. These concerns, however, do not justify discrimination against the handicapped. Simply put, the complaint of "no *more* in my back yard" is just as unacceptable an excuse for discrimination against the handicapped as the discriminatory cry of "not in my back yard." *See Horizon House Developmental Services. Inc. v. Township of Upper Southhampton*, 804 F. Supp. 683, 698 ("the FHAA rejects any notion that a Township can somehow avoid the antidiscrimination mandate by accepting some sort of 'fair share' or apportionment of people with disabilities"), *aff'd* 995 F.2d 217 (3rd Cir. 1993).

**2. Discriminatory Impact**

Under the standards established by the Eighth Circuit, to prevail on a discriminatory impact theory, plaintiff must first make a prima facie showing that the challenged ordinance has a discriminatory effect. *See Familystyle*, 923 F.2d at 94; *City of Black Jack*, 508 F.2d at 1185. "If the law has such an effect, the burden shifts to the governmental defendant to demonstrate that its conduct was necessary to promote a governmental interest commensurate with the level of scrutiny afforded the class of people affected by the law under the equal protection clause." *Familystyle*, 923 F.2d at 94. In *Familystyle* the Eighth Circuit concluded that handicapped persons are not members of a suspect class, relying on *City of Cleburne v. Cleburne Living*

*Center. Inc.*, 473 U.S. 432, 446 (1985), and therefore held that the proper level of scrutiny is whether the legislation is "rationally related to a legitimate government purpose." *Id.*[16]

Applying that analysis to the application of the zoning ordinances here, it is clear that plaintiffs have made a prima facie showing of discriminatory effect. First, the zoning ordinance in effect when OH-C opened and this case was filed clearly had a disparate impact upon handicapped persons by severely limiting the housing available to them. That ordinance allowed no group homes for the handicapped as of right in any residential zoning district. At the time OH-C was cited, a group home for more than three unrelated individuals with disabilities could not operate as a matter of right in any zoning district in the City of St. Louis other than the "I" Central Business District and "L" Jefferson Memorial District. The City has argued that the ordinance was non-discriminatory because it applied equally to handicapped and non-handicapped unrelated persons. Although facially neutral, however, the ordinance was enforced in a discriminatory manner and had a disparate effect on handicapped persons. Plaintiffs presented evidence that the City had not prosecuted

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[16] *Cleburne*, of course, was decided prior to the 1988 amendments at issue here, and was an equal protection case, not a case brought under the Fair Housing Amendments Act. Although the Eighth Circuit did not discuss this distinction in *Familystyle*, it would seem that the 1988 amendments now require a court to use a higher degree of scrutiny in Fair Housing Amendment Act cases than that used in *Cleburne*. *Familystyle's* requirement that the ordinance be *necessary* to promote the government interest may well be a tacit reflection of this enhanced status and stricter scrutiny required by the 1988 amendments. Because the Court in *Familystyle* found that the state law at issue there did not have a disparate impact on the handicapped, but instead promoted the same goals as the FHAA, it did not actually need to go on to the second part of the analysis.

various religious orders who had more than three unrelated individuals living in single-family districts.[17]

There can be no doubt that the effect of the City's three-person rule limited the ability of handicapped persons to live in the residence of their choice in the community. The evidence at trial showed that while groups of unrelated non-disabled people may occasionally wish to live together in residential neighborhoods, recovering alcoholics and addicts in the early stages of sobriety *need* such housing as a result of their disability. Plaintiffs showed that they face a substantial risk of relapse from the isolation of living alone, the stress of living with enabling or using family members, and the peer pressure inherent in returning to their old neighborhoods. Because of their disability, newly recovering alcoholics and addicts often lack the financial and personal resources necessary to return to independent living. For their adequate and continued recovery they need a living arrangement in which a critical mass of recovering individuals may live together in affordable, supportive, drug-free housing in middle-class residential neighborhoods. By definition the Central Business and Jefferson Memorial zoning districts are nonresidential areas that are unsuitable for the location of an Oxford House. Limiting the number of Oxford House residents to three or fewer would essentially eviscerate the Oxford House program, from both a therapeutic and financial standpoint. By so severely limiting the numbers of Oxford House residents and the neighborhoods where such houses could locate, defendant's original zoning ordinance essentially made appropriate housing for these handicapped individuals impossible to secure within the City of St. Louis. The zoning ordinance in effect at the time OH-C was

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[17] Defendant's argument that it never enforced the ordinance against religious orders because no one ever complained supports the argument that defendant enforced the ordinance only against politically unpopular groups like the handicapped plaintiffs here.

cited had a discriminatory impact on handicapped individuals by denying them this necessary housing option.[18]

Moreover, the new city ordinance allowing group homes for up to eight handicapped residents in most of the City's residential neighborhoods has not cured the discrimination, but has, as enforced, continued the discrimination against the handicapped. Because Oxford Houses typically require more than eight residents,[19] the zoning scheme still prevents them from operating as a matter of right in any residential zoning district in City, indeed, again in any zoning district except the "I" and "L" districts.[20] Plaintiffs presented substantial credible evidence showing that more than eight residents are needed for OH-C and OH-W to operate viably from both a financial and therapeutic viewpoint. Limiting the number to eight would severely limit the Oxford House program's ability to operate successfully, and would require these two successful houses to close.

Congress recognized, in passing the 1988 amendments, that group homes were necessary living arrangements for some handicapped individuals, and that facially neutral policies could

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[18] Defendant has argued that it had a "policy" of allowing up to eight unrelated handicapped individuals to live in a single-family district even under the three-person ordinance. This argument is not supported by the evidence; if, in fact, that was defendant's "policy" it surely would have communicated that policy to the representatives from the Missouri Department during one of their initial contacts which discussed Oxford Houses in general or OH-C in particular.

[19] As stated before, 80% of all Oxford Houses have more than eight residents.

[20] They would not be allowed even as a conditional use in the single-family neighborhoods at issue here, or even in the "B", two-family, or "C", multiple-family, districts, but instead would require a variance from the zoning code to operate in those districts. Both parties' expert witnesses testified that "use variances" such as this do not promote zoning policy, and that nonconforming "uses" should not be allowed.

be used to deny equal housing to handicapped persons. The legislative history to the 1988 amendments to the Fair Housing act noted that:

> While state and local governments have authority to protect safety and health and to regulate use of land, *that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities.* [Citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 435 (1985).] *This has been accomplished by such means as the enactment of health. safety or land use requirements on congregate living arrangements among non-related persons with disabilities.* Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against people with disabilities.
>
> The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land use regulations, restrictive covenants, and *conditional or special use permits* that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community . . .
>
> Another method of making housing unavailable to people with disabilities has been the application of enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears about the problems that their tenancies may pose. These and similar practices would be prohibited.

H.R. Rep., No. 171, 100th Cong., 2d sess. 19, reprinted in 1988 U.S. Code Cong. & Admin. News 2173, at 2185.

Thus, plaintiffs met their burden of showing that both the old and the new city ordinances had a disparate impact on them because of their handicap.[21] The burden then shifts to the City to show that its actions were necessary to promote legitimate governmental interests. *Familystyle*, 923 F.2d at 94. Under *Familystyle*, this is a two-part burden: the City must show that it has a legitimate governmental interest it seeks to protect, but it also must show that the scheme at issue was necessary to promote that interest. The Court agrees with defendant that zoning ordinances in general, and single-family-zoning districts in particular, promote the legitimate governmental interest of maintaining the residential character of a neighborhood and segregating single families from rooming houses, multi-family apartments, and commercial or industrial uses in that same area. *See. e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The city ordinance at issue here, however, as enforced against these plaintiffs, does not promote those goals, and certainly is not necessary to promote those goals.[22]

The evidence showed that the Oxford Houses at issue here had not caused any adverse impact on the neighborhoods where they are located. Both locations are quite close to non-residential uses, so the argument that the Oxford Houses somehow destroy the single-family residential character of the blocks makes no sense. Doctors offices are located on the same block as OH-W. A commercial area including a gas station and hotel is located across the street from OH-C. Transiency must not be an issue, as two baby-sitting centers per block are allowed as of right and Bed and Breakfasts are conditional uses. The gross number of occupants cannot be the issue, as the same number of grown siblings or cousins would be allowed under the zoning scheme, and a total

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[21] Plaintiffs' evidence meets their burden regardless of whether the so called "immediate effects" or "ultimate effects" standards are applied.

[22] Stated another way, there are other, less discriminatory ways to promote such a goal, such as spacing requirements of the type approved in *Familystyle*.

of ten individuals (the number desired by OH-C) would be allowed under the new ordinance so long as eight were handicapped and two were caretakers: both of these allowed situations, with ten adults, would have the same impact on the neighborhood as the Oxford House. Both houses are well-maintained and the residents have made every effort to be good neighbors — in one case making sure that their garbage did not overburden the community dumpster, and in the other case voluntarily agreeing to limit the number of residents' cars parking on the street.

The evidence also showed that all scientific studies involving group homes of nine or more demonstrate that such congregate living arrangements have no discernible effect on property values, safety, crime rates, or any other measurable value. From the perspective of the interests the zoning ordinances are intended to address, the presence of OH-C and OH-W with their ten and twelve (as opposed to eight) residents simply does nothing to undermine the City's zoning ordinance. Stated conversely, enforcing the limit of eight residents does not promote the City's asserted governmental interest in maintaining the residential nature of its single-family-zoning district.

The City presented no specific justification for the new ordinance's limit of eight persons, and stated no legitimate interest that allowing eight Oxford House residents, but not ten or twelve, would promote. Even the City's own zoning expert provided no rational explanation for a zoning scheme that would allow eight handicapped persons as of right in the three most restrictive districts ("A" single-family, "B" two-family, and "C" multiple-family) but that would not allow a group home to add even one additional handicapped resident to live in those districts even as a "conditional use." The ordinance is not rational in this regard, as surely if eight handicapped persons are consistent with the "residential character" of the single-family district, nine should, at a minimum, be considered a "conditional use."

This irrationality and internal inconsistency of the ordinance itself defeats the City's burden of showing that its ordinance is necessary to protect a legitimate governmental interest, at best, and at worst could be viewed as evidence of intentional discrimination in the legislative process.

The City has argued that its limit of eight plus two caretakers implemented a state policy limiting group homes in single-family neighborhoods to eight residents. As the undersigned held in denying the defendant's earlier motion to dismiss in this case, the state law, § 89.020.2, R.S.Mo. (1991), does not provide a ceiling or express a state policy limiting group homes to eight residents, but merely does what it says it does, which is require cities, at a minimum, to treat group homes with eight or fewer handicapped residents as single-family homes.[23]

### 3. Reasonable Accommodation

Defendant, of course, could have alleviated the discriminatory effect of even its three-person ordinance (despite its conflict with state law), by making reasonable accommodations for the plaintiffs here. Instead of reasonable accommodation, however, the City responded with enforcement attempts that demonstrated intentional discrimination. Even if, *arguendo*, the plaintiffs had

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[23] In this regard the Court notes that the Western Division of the Missouri Court of Appeals has interpreted § 89.020.2 as not applying to recovering drug addicts or alcoholics because they are not specifically named in the statute as "mentally or physically handicapped persons." *See City of St. Joseph v. Preferred Family Healthcare. Inc.*, 859 S.W.2d 723 (Mo. Ct. App. 1993). The same court also held that preventing group homes of more than five recovering drug abusers and alcoholics did not violate the Fair Housing Act. The undersigned disagrees with both conclusions reached by the Missouri Court of Appeals. This Court is not bound, of course, by the state court's determination of federal law, and the Missouri court's interpretation of the state statute has no effect on the outcome of this case, since the City here has not argued that § 89.020.2 does not apply to recovering drug and alcohol abusers.

failed to prove either intentional discrimination or disparate impact, the Court finds that defendant's failure to agree to nonenforcement of the zoning ordinance for OH-C and OH-W violated § 3604(f)(3)(B) as it was a failure to make a reasonable accommodation necessary to afford these handicapped plaintiffs with an equal opportunity to the housing of their choice.

Failure to make reasonable accommodations is an independent Fair Housing Act violation, and the reasonable accommodation requirement applies to zoning ordinances and their enforcement. *See Oxford House. Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993). An accommodation is reasonable if it would not require a fundamental alteration in the nature of a program and if it would not impose undue financial or administrative burdens on the defendant. *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1383 (3d Cir. 1991).

Plaintiffs argue that reasonable accommodations would have required no more than non-enforcement of the zoning ordinances to OH-C and OH-W. Plaintiffs requested that accommodation by the communications Nkosi Halim had with City officials shortly after the City inspectors first showed interest in Oxford House-Clayton, and later by the letters and other communications between Oxford House, Inc., and the City Counsellor's office. Defendant argues that these requests were made to the wrong people, and that the only valid way for plaintiffs to have requested any accommodation was to file a request for a variance.

First, defendant's argument that the requests were not directed to the appropriate decision makers improperly twists the evidence. Halim's requests, both oral and in writing, to Inspector Murphy were met with Murphy's refusal to deal with Halim, and his citation of the record owners for the zoning and building code violations. The City makes no attempt to explain why Murphy, who was actively communicating with his superiors and other

City officials on ways to block the Oxford Houses, could not have either passed Halim's request on to the appropriate officials, or have informed Halim who those officials were. Similarly, the letter from Oxford House, Inc.'s lawyer to the City Counsellor could easily have been viewed by the City as a request for reasonable accommodation. The evidence shows that the City was determined to consider no requests for accommodation other than a formal application for a variance. As set forth in more detail below, the Court finds the City's insistence on using the variance process to be misplaced. The Court finds the argument that the reasonable accommodation request was directed to the wrong authorities to be an attempt to obfuscate the issues.

Second, the City's insistence that the only accommodation possible was resort to the variance procedures is not reasonable. Although a variance, if granted, would have allowed an Oxford House with more than eight residents to operate in zones "A" through "C", and a conditional use permit could have allowed operation in zoning districts "D" through "H", plaintiffs cannot lawfully be required to attempt those procedures. Requiring compliance with those procedures in this situation would have a discriminatory effect on plaintiffs. The procedures require a public hearing, public advertisement of the hearing, and the posting of a conspicuous notice on the block and on the House itself. Plaintiffs presented credible evidence that this process stigmatizes recovering alcoholics and addicts, perpetuates their self-contempt, and increases the stress which can so easily trigger relapse. *Accord Stewart B. McKinney Foundation*, 790 F. Supp. at 1219-20; *Ardmore. Inc. v. City of Akron*, 1990 WL 385236 (N.D. Ohio August 2, 1990).

Moreover, the evidence presented showed that aldermanic and community support or opposition have a strong impact on the outcome of applications for conditional uses and variances, and that these Oxford Houses would not have obtained a vari-

ance had they sought one. The City's practice is to solicit opposition or support from the alderman and neighborhood organizations, and such opposition or support usually has a determinative effect on whether variances or conditional use permits are approved. The clear inference from the evidence presented was that had plaintiffs participated in the procedures, they not only would have found their own recovery (and thereby their own self-worth) opened up for public debate and the additional airing of stereotypical fears and concerns, but in doing so they would have obtained only a denial of the requested variance or conditional use.[24] The alderman had already expressed his opposition to the neighborhood groups, who had in turn expressed their own stereotypical and unfounded fears of persons suffering from these particular handicaps. The variance process would have provided only a futile remedy, and going through the process may well have caused the very risk of relapse that Oxford House attempts to prevent. *Accord, Horizon House*, 804 F. Supp. at 692; *Township of Cherry Hill*, 799 F. Supp. at 462 n.25.

The Court further finds that the accommodation requested here by OH-C and OH-W was reasonable. The request was simply that the zoning ordinance not be enforced as to these two houses. Compliance with this request for non-enforcement would not have required any fundamental change in defendant's zoning policy, nor would it have imposed any financial or administrative burden on the defendant. In fact, the evidence presented at trial showed that non-enforcement of the zoning code in these instances would have no adverse effect on the City's zoning scheme or on the surrounding neighborhoods. Indeed, the City admitted that it does not enforce its related-party rule in the absence of complaints, so nonenforcement in this situation

[24] Additionally, as both experts testified, under zoning theory (as opposed to practice) a "use variance" such as this should not normally be granted in light of the zoning code's legislative determination that group homes for more than eight are not even approved conditional uses in zones "A", "B", and "C".

would not fundamentally change its zoning program. The City's refusal to comply with this request for reasonable accommodation violated the Fair Housing Act.

### D. The Building and Occupancy Codes

The Court finds that the plaintiffs did not meet their burden of showing any discrimination in the City's enforcement of its building and occupancy codes, nor did they show that their requested non-enforcement of these codes was a request for reasonable accommodation. Plaintiffs did not show that the ceiling and window requirements enforced against OH-C were enforced in any discriminatory manner or had a disparate impact on handicapped individuals. Moreover, the evidence did not show that by virtue of plaintiffs' handicap they need non-enforcement of these health and safety codes in order to have equal opportunity to housing. Although plaintiffs' expert testified that the ceiling height requirement was not a necessary building code requirement, plaintiffs simply did not show any intentional discrimination or disparate impact in the enforcement of these codes, which are not reasonably related to a legitimate state interest. Plaintiffs are not, simply by virtue of their being handicapped, excused from the reasonable governmental requirements that apply to other members of society. If the City's concern is in fact overcrowding (and not a discriminatory concern about the "types" of people who live in a given building) it certainly can enforce its reasonable building and occupancy codes in a manner to prevent such overcrowding. Requiring a reasonable number of square feet per occupant or reasonable ceiling heights is well within the City's prerogative, and there is no evidence to justify enjoining the City from continuing such enforcement.

### E. The § 3617 Claim

Plaintiffs also claim that defendant violated § 3617 of the Fair Housing Act, which makes it unlawful "to coerce, intimidate,

threaten or interfere with," a person's rights protected under the Act, or to interfere with others who aid or encourage protected persons in the exercise of their rights. A violation of this statute requires plaintiffs to prove four elements: (1) the occupants are members of a protected class; (2) the protected individuals were engaged in the exercise or enjoyment of rights to equal housing or the housing advocate or provider was aiding or encouraging protected individuals in the exercise of their equal housing rights; (3) defendant was motivated by an intent to discriminate; and (4) interference on account of the protected individuals' having exercised their right to live in the neighborhood of their choice. *See People Helpers Foundation v. City of Richmond*, 781 F. Supp. 1132, 1134 (E.D. Va. 1992). Plaintiffs have met their burden of showing each of these elements, as (1) they are handicapped and therefore are members of a protected class; (2) they were engaged or attempted to engage in their exercise of equal housing rights, by attempting to live in a single-family residential neighborhood; (3) defendant was motivated by intentional discrimination, as it acted towards plaintiffs in the way it did because of plaintiffs' status as recovering alcoholics and addicts; and (4) defendant, by refusing to agree to non-enforcement of the zoning ordinances, interfered with plaintiffs' equal housing rights. *See Stewart B. McKinney Foundation, supra*, 790 F. Supp. at 1221; *Oxford House-Evergreen v. Plainfield*, 769 F. Supp. 1329, 1344 (D.N.J. 1991).

## II. The Rehabilitation Act Claim

Section 504 of the Rehabilitation Act, as it was in effect at the time of defendant's actions here, provided that

> No otherwise qualified individual with handicaps . . . shall, solely by reason of . . . his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

29 U.S.C. § 794(a).[25] A violation of this statute requires plaintiffs to prove four elements: (1) plaintiffs are handicapped; (2) they are otherwise qualified for participation in the program; (3) the program receives federal financial assistance; and (4) plaintiffs were subjected to discrimination by a program receiving federal financial assistance. *See Sullivan v. City of Pittsburg*, 811 F.2d 171, 181-82 (3rd Cir. 1987). Recovering alcoholics and addicts are handicapped within the meaning of section 504. *See* 24 C.F.R. § 8.3; *Sullivan*, 811 F.2d at 182; *Gallagher v. Catto*, 778 F. Supp. 570 (D.D.C. 1991), *aff'd without op.* 988 F.2d 1280 (1993); *Anderson v. University of Wisconsin*, 665 F. Supp. 1372 (W.D. Wisc. 1987) *aff'd* 841 F.2d 737 (7th Cir. 1988).

For the same reasons that the Court concluded that plaintiffs had shown discriminatory intent, discriminatory impact, and failure to reasonably accommodate under the Fair Housing Act, the Court finds that plaintiffs are also entitled to relief against defendant on their Rehabilitation Act claim. Because defendant was a recipient of federal Community Development Block Grant funds, its zoning operations constitute a "program or activity receiving federal financial assistance" under the Rehabilitation Act. Since plaintiffs have proven that they were discriminated against in the operation of such a program, they are also entitled to relief under this act.

## III. Equal Protection

Plaintiffs also assert that defendant's actions violate the Fourteenth Amendment to the United States Constitution, and that they are entitled to recover under 42 U.S.C. § 1983 for this deprivation of their constitutional rights. However, since this Court finds in favor of plaintiffs on statutory grounds, it will decline to address the constitutional claim. It is well settled that

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[25] The language of the act was amended by Pub. L. 102-569, October 29, 1992, but those amendments have no effect on the substance of the claim presented here or the analysis of that claim.

a court should "avoid unnecessary constitutional rulings." *See, e.g., Support Ministries for Persons with AIDS Inc.*, 808 F. Supp. at 138; *Association of Relatives and Friends of AIDS Patients*, 740 F. Supp. at 107; *Baxter v. City of Belleville*, 720 F. Supp. 720, 734 (S.D. Ill. 1989).

## IV. HCDA Claim

Plaintiffs also claim that they were subjected to deprivations of their rights secured by §§ 5304(b)(2) and 5309 of Title I of the Housing and Community Development Act (hereinafter "HCDA"), in violation of 42 U.S.C. § 1983. Defendant argues that there is no § 1983 right of action because Congress intended to foreclose such a right of action under the HCDA.

The HCDA does not explicitly provide a right of action for those who allege a violation of its terms. Whether a statutory violation can give rise to a claim under 42 U.S.C. § 1983 depends on the Congressional intent, as shown under the four-part test promulgated by the Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). Under *Cort* a private right of action exists only if (1) the plaintiff is part of an especial class for whose benefit the statute was enacted; (2) the legislature intended to create a private remedy; (3) a private remedy is consistent with the purposes of the legislation; and (4) the cause of action is not founded on an area "traditionally relegated to state law." *Id.* at 78.

Here the Court agrees with defendant and with the majority of courts that have considered this issue, and finds that there is no private right of action under the HCDA. The HCDA was not passed for the purpose of preventing discrimination, but rather "was passed in response to Congress' concern for the 'critical social, economic and environmental' conditions existing in the nation's cities. The statute's primary objective was 'the development of viable urban communities.'" *Latinos Unidos De Chelsea v. Secretary of Housing*, 799 F.2d 774, 793 (1st Cir. 1986) (quoting 42 U.S.C. §§ 5301(a) & (c). Thus, plaintiffs are not part of an "especial class" for whose benefit the statute was intended,

and no private cause of action should be implied. *Id.* at 794; *see also Nabke v. Department of Housing and Urban Development*, 520 F. Supp. 5 (W.D.Mich. 1981); *People's Housing Development Corp. v. City of Poughkepsi*, 425 F. Supp. 482 (S.D.N.Y. 1976); *but see Montgomery Improvement Ass'n v. Department of Housing and Urban Development*, 645 F.2d 291, 294-95 (5th Cir. 1981).

## V. Defendant's Counterclaim

Defendant filed a counterclaim seeking to have plaintiffs enjoined from violating the zoning and building ordinances. For the reasons set forth above, defendant is not entitled to judgment on this counterclaim, and it will be dismissed on the merits.

## VI. Conclusion

For the reasons set forth above, plaintiffs are entitled to a declaratory judgment that defendant's enforcement of its zoning ordinance prohibiting more than eight unrelated handicapped persons from living in a single-family district as applied to Oxford House-C and Oxford House-W violates plaintiffs' rights under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* and the Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiffs are also entitled to a permanent injunction enjoining the City from enforcing its zoning codes to prohibit OH-C and OH-W from operating with ten and twelve members respectively. Plaintiffs are not entitled to a broader injunction regarding all zoning or building codes. A separate judgment in accord with this opinion is entered this same date. Plaintiffs are directed to file any motion for attorneys' fees as directed by Local Rule 30.

/s/ Catherine D. Perry
CATHERINE D. PERRY
UNITED STATES
MAGISTRATE JUDGE

Dated this 28th day of January, 1994.

# APPENDIX D

# STATUTES, RULES, AND ORDINANCES INVOLVED

## STATUTES

**42 U.S.C.**

**§ 3604. Discrimination in the sale or rental of housing and other prohibited practices.**

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

**(a)** To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.

**(b)** To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial statues, or national origin.

**(c)** To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

**(d)** To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

**(e)** For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

**(f)(1)** To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of—

**(A)** that buyer or renter,

**(B)** a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available, or

**(C)** any person associated with that buyer or renter.

**(2)** To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

**(A)** that person; or

**(B)** a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

**(C)** any person associated with that person.

**(3)** For purposes of this subsection, discrimination includes—

**(A)** a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may

where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

**(B)** a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

**(C)** in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that—

**(i)** the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

**(ii)** all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

**(III** all premises within such dwellings contain the following features of adaptive design:

**(I)** an accessible route into and through the dwelling;

**(II)** light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

**(III)** reinforcements in bathroom walls to allow later installation of grab bars; and

**(IV)** usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

**(4)** Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

**(5)(A)** If a State or unit of general local government has incorporated into it laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

**(B)** A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

**(C)** The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

**(D)** Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

**(6)(A)** Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

**(B)** Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

**(7)** As used in this subsection, the term "covered multifamily dwellings" means—

**(A)** buildings consisting of 4 or more units if such buildings have one or more elevators; and

**(B)** ground floor units in other buildings consisting of 4 or more units.

**(8)** Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.

**(9)** Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

### § 3615. Effect on State laws

Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or of any other jurisdiction in which this subchapter shall be effective,

that grants, guarantees, or protects the same rights as are granted by this subchapter; but any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid.

**§ 3617. Interference, coercion, or intimidation**

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, or 3606 of this title.

**29 U.S.C.**

**§ 794. Nondiscrimination under Federal grants and programs.**

**(a) Promulgation of rules and regulations**

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to 'carry out' the amendments to this section made by the Rehabilitation Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committee.

**(b) "Program or activity" defined.**

For the purposes of this section, the term "program or activity" means all of the operations of—

**(1)(A)** a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

**(B)** the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

**(2)(A)** a college, university, or other postsecondary institution, or a public system of higher education; or

**(B)** a local educational agency (as defined in section 8801 of Title 20) system of vocational education, or other school system;

**(3)(A)** an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

**(i)** if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

**(ii)** which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

**(B)** the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

**(4)** any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

**(c) Significant structural alterations by small providers; exception**

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

**(d) Standards used in determining violation of section—**

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of section 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

## FEDERAL RULES

### Rule 52. Findings by the Court; Judgment on Partial Findings

**(a) Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

## ORDINANCES

## ORDINANCE 59979

### Section Three. 26.08. ZONING DEFINITIONS

**26.08.025. Accessory Use** — The term applied to a use that is subordinate in physical character to the principal use, that is clearly incidental to the principal use and that is located on the same lot with the principal use.

**26.08.115. Dwelling Unit** — A room or group of rooms with cooking and sanitary facilities, occupied or arranged for occupancy by a single family.

**26.08.120. Dwelling, Single-Family** — A building containing one dwelling unit.

**26.08.160 Family** — A person, or group of persons immediately related by blood, marriage or adoption, living as a single housekeeping unit; also a group of not more than three (3) persons not necessarily related by blood, marriage or adoption, living as a single housekeeping unit.

**26.08.3300 Non-conforming use** — Any building or land lawfully occupied by a use on May 25, 1950, or on the effective date of any amendment to Ordinance 45309, and which is in conflict with one or more of the regulations of the district in which it is situated.

**26.08.480 Zoning Administrator** — A position created within the Department of Public Safety and appointed by the Building Commissioner. The position is responsible for administering and enforcing the Zoning Code, in accordance with Chapter 26.88.

**Section Five. 26.16. GENERAL ZONING REGULATIONS**

**26.16.050. Changes in non-conforming use** — If no structural alterations are made, non-conforming use of a building may be changed to another non-conforming use of the same or a more restricted classification.

**26.16.060. Discontinuing non-conforming use** — In the event a non-conforming use of any structure or premises is discontinued or its normal operation stopped for a period of 1 year, the use of the same thereafter shall conform to the regulations of the district in which it is located.

**Section Six. 26.20 — "A" SINGLE-FAMILY DWELLING DISTRICT**

**26.20.010. District regulations** — The regulations set forth in this Chapter or set forth elsewhere in the Zoning Code when referred to in this Chapter are the district regulations in the "A" Single-Family Dwelling District.

**26.20.020. Use regulations** — A building or premises shall be used only for the following purposes:

1. Single family dwellings;

2. Two-family dwellings which comply with the area and parking regulations of the "B" Two-Family Dwelling District where 40 percent or more of the frontage of a street is occupied by either two-family, semi-detached two-family or multiple-family dwellings;

3. Home occupations, subject to the provisions of section 26.80.060;

4. Publicly owned parks, playgrounds and libraries and privately owned parks and playgrounds wherein no service is rendered, or activities conducted, as a business;

5. Accessory structures and uses customarily incidental to any of the above uses except that, if the accessory structure is a garage, it shall only be a private garage that is located not less than 60 feet from the front line nor less than 4 feet from any side lot line nor exceeding 12 feet in height nor occupying more than 30 percent of a rear yard;

6. Temporary buildings for use incident to construction work, which buildings shall be removed upon the completion or abandonment of the construction;

7. Signs — See Chapter 20.68.

**26.20.025. Conditional Uses** — The following conditional uses may be allowed in the "A" Single-Family Dwelling District, subject to the provisions of Section 26.80.010

1. Cemeteries;

2. Churches;

3. Farming and truck gardening;

4. Governmental buildings.

5. Greenhouses providing no product is sold on the premises;

6. Hospitals;

7. Off-street automobile parking facilities;

8. Parking facilities and open lots located between the front yard and the structure;

9. Publicly owned museums and art galleries;

10. Schools;

11. Utility stations and utility towers.

## ORDINANCE 62183

**SECTION TWO.** A New Section Nine is hereby included which shall read as follows:

**SECTION NINE. 26.32 "D" MULTIPLE-FAMILY DWELLING DISTRICT**

**26.32.010. District Regulation** — The regulations set forth in this Chapter or set forth elsewhere in the Zoning Code when referred to in this Chapter are the district regulations in the "D" Multiple-Family Dwelling District.

**26.32.015. Purpose** — The purpose of the "D" Multiple-Family Dwelling District is to maintain older medium density residential districts, to preserve older architectural styles while encouraging a harmonious intermingling of other structures, and to provide for an increased variety and intermixture of uses free from other uses except those both compatible and convenient to the residents of such district.

**26.32.020. Use Regulations** — A building or premises shall be used only for the following purposes:

1. Any use permitted in the "C" Multiple-Family Dwelling District;

2. A canopy, open at the sides, may be provided in the required yard space of any building, for the shelter of persons entering such building from the street or other designated point of disembarkation from vehicles;

3. Accessory structures and uses customarily incidental to any of the above uses;

4. Temporary buildings for use incidental to construction work, which buildings shall be removed upon the completion or abandonment of the construction.

**26.32.025. Conditional Uses** — The following conditional uses may be allowed in the "D" Multiple Family Dwelling District, subject to the provisions of Section 26.80.010:

1. Any use eligible to be a conditional use in the "C" Multiple-Family Dwelling District;

2. The following neighborhood commercial retail uses, provided that the use is confined to the first floor or basement of the main building:

A. Art galleries and studios;

B. Bakery shops;

C. Barber and beauty shops;

D. Book, magazine, and stationery stores;

E. Drug stores;

F. Dry cleaning pick-up stations (not having on-site processing);

G. Financial institutions;

H. Florists;

I. Gift shops;

J. Hardware stores;

3 Greenhouses;

4. Hotels;

5. Nursing and convalescent homes, children's homes, and homes for the aged;

6. Professional and general offices not exceeding 3,500 square feet;

7. Rooming and boarding houses, half-way houses, and penal institutions; including group homes and residential-custodial care facilities, residential facilities for treatment of alcohol and other drug abuse (except for current users of illegal drugs or addicts of a controlled substance), and homes in which nine or more (or such other lesser or greater number as state law may in the future mandate) unrelated mentally or physically handicapped persons reside.

## ORDINANCE 62588

**SECTION TWO. Section Three. 26.08. Zoning Definitions**

**26.08.025. Accessory Use** — The term applied to a use that is subordinate in physical character to the principal use, that is clearly incidental to the principal use and that is located on the same lot with the principal use.

**26.08.053. Bed and breakfast guest-house.** — A dwelling having not more than seven guestrooms where travelers for compensation are lodged for sleeping purposes with at least a morning meal provided. It is owner-occupied, and no more than three (3) guestrooms shall be served by one bathroom and a separate bathroom must be maintained for the owner occupants.

**26.08.060. Boarding House** — A rooming house where, for compensation, meals are provided.

**26.08.115. Dwelling Unit** — A room or group of rooms with cooking and sanitary facilities, occupied or arranged for occupancy by a single family.

**26.08.120. Dwelling, Single-Family** — A building containing one dwelling unit.

**26.08.160. Family** — A person, or group of persons immediately related by blood, marriage or adoption, living as a single housekeeping unit; also a group of not more than three (3)

persons not necessarily related by blood, marriage or adoption, living as a single housekeeping unit.

**26.08.230. Guestroom** — A room for lodging by no more than four (4) persons in a bed and breakfast establishment.

**26.08.260. Hotel** — A building, other than a bed and breakfast inn, used as the abiding place of more than 20 persons who are for compensation lodged with or without meals.

**26.08.330. Non-conforming use** — Any building or land lawfully occupied by a use on May 25, 1950, or on the effective date of any amendment to Ordinance 45309, and which is in conflict with one or more of e regulations of the district in which it is situated.

**26.08.380. Rooming house** — A dwelling, other than a hotel or bed and breakfast establishment, where, for compensation, lodging only is provided.

**26.08.433. Tourist home** — A bed and breakfast establishment.

**26.08.480. Zoning Administrator** — A position created within the Department of Public Safety and appointed by the Building Commissioner. The position is responsible for administering and enforcing the Zoning Code, in accordance with Chapter 26.88.

**SECTION THREE. Section Six. 26.20 — "A" SINGLE — FAMILY DWELLING DISTRICT**

**26.20.010. District regulations** — The regulations set forth in this Chapter are the district regulations in the "A" Single-Family Dwelling District.

**26.20.020. Use regulations** — A building or premises shall be used only for the following purposes:

1. Single family dwellings:

A. Any dwelling is so defined as a single family residence because it is house in which eight or fewer unrelated mentally or physically handicapped persons reside, and may also include two additional persons acting as houseparents or guardians who need not be related to each other or to any of the mentally or physically handicapped persons residing in the home may not be within 1,250 feet of another such home or dwelling.

2. Two-family dwellings which comply with the area and parking regulations of the "B" Two-Family Dwelling District where 40 percent or more of the frontage of a street is occupied by either two-family, semi-detached two-family or multiple-family dwellings;

3. Home occupations, subject to the provisions of Section 26.80.060;

4. Publicly owned parks, playgrounds and libraries and privately owned parks and playgrounds wherein no service is rendered, or activities conducted as a business;

5. Accessory structures and uses customarily incidental to any of the above uses except that, if the accessory structure is a garage, it shall only be a private garage that it [sic] located not less than 60 feet from the front line nor less than 4 feet from any side lot line nor exceeding 12 feet in height nor occupying more than 30 percent of a rear yard;

6. Temporary buildings for use incident to construction work, which building shall be removed upon the completion or abandonment of the construction;

7. Signs — See Chapter 26.68.

8. Babysitting Center — but no more than one on either side of the street in the same block.

**26.20.025. Conditional Uses** — The following conditional uses may be allowed in the "A" Single-Family Dwelling District, subject to the provisions of Section 26.80:

1. Bed and breakfast guesthouse, subject to the additional provisions of Chapter _____ (B.B.355);

2. Bed and breakfast homestay, subject to the additional provisions of Chapter _____ (B.B.355);

3. Cemeteries;

4. Churches;

5. Farming and truck gardening;

6. Governmental buildings.

7. Greenhouses, providing no product is sold on the premises;

8. Hospitals;

9. Off-street automobile parking facilities;

10. Parking facilities and open lots located between the front yard and the structure;

11. Publicly owned museums and art galleries;

12. Schools;

13. Utility stations and utility towers.

## ORDINANCE 62589

**SECTION ONE. Establishment Procedure.** A bed and breakfast district may be established and designated by ordinance in any area which contains one (1) or more contiguous city blocks, or portions of city blocks in the following manner.

**SECTION THREE. Effect of District Designation.**

(A) No person shall own, operate or maintain a bed and breakfast homestay, a bed and breakfast guesthouse, or a bed and breakfast inn within any bed and breakfast district, as set forth in this ordinance, without first obtaining a permit from the Board of Public Service and a graduated business license from the License Collector; provided, however, that notwithstanding the provision of any other ordinance, no such person shall be required to file a plat and neighborhood consent petition as a condition for a bed and breakfast establishment permit or license.

(B) Notwithstanding the provision of any use regulations for any zoning district, any building or premises within a bed and breakfast district may be used for the purposes of a bed and breakfast establishment as a use by right; provided said building or premises meets and maintains the requirements established in Section Three of Ordinance _____ (B.B.355); and provided further that no person shall own, operate, manage or maintain a bed and breakfast establishment that violate the rules, regulations and requirements of said Section Three of Ordinance _____ (B.B.355)

Supreme Court, U.S.
F I L E D
JUN 28 1996
CLERK

(2)

# No. 95-1925

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

OXFORD HOUSE-C., an unincorporated association; OXFORD HOUSE, INC., a Delaware not-for-profit corporation; OXFORD HOUSE-W., an unincorporated association; MISSOURI DEPARTMENT OF MENTAL HEALTH, DIVISION OF ALCOHOL & DRUG ABUSE,

*Petitioners,*

vs.

CITY OF ST. LOUIS,

*Respondent.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## RESPONDENT'S BRIEF IN OPPOSITION

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent the City of St. Louis respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 77 F.3d 249 (8th Cir. 1996).

## STATEMENT OF THE CASE

This case was initially brought by Oxford House-C, an association comprising the residents of a group home in St. Louis for recovering alcoholics and drug addicts, and Oxford House, Inc., a corporation that organizes Oxford Houses and collected loan payments from Oxford House-C. Oxford House-W, another association of recovering alcoholics and drug addicts, was added to the suit later upon agreement of counsel. The sole defendant was the City of St. Louis, Missouri. The suit alleged that the Fair Housing Act exempted plaintiffs (sometimes referred to collectively herein as "Oxford House" or "petitioners") from the City's zoning and building code requirements, including the City's requirement that groups of nine or more unrelated, handicapped individuals must obtain a variance before occupying a single-family residence. Oxford House also claimed that the City's threatened enforcement of the its zoning and building codes violated myriad provisions of federal law, although their principal claims stemmed from the Fair Housing Act and the Rehabilitation Act. The City filed a counterclaim requesting that the court enjoin plaintiffs from violating the City's zoning code and existing structures code.[1]

Both Oxford House-C and Oxford House-W are located in neighborhoods zoned for single-family residential use. Oxford House-C opened with 11 unrelated, adult male residents[2] and Oxford House-W had 12 unrelated, adult male residents. The

[1] The Missouri Department of Mental Health, Division of Alcohol and Drug Abuse, a division of a department of the State of Missouri, later joined the case as a co-plaintiff. The United States of America intervened for the purpose of defending the constitutionality of the Fair Housing Act

[2] The number at Oxford House-C. was subsequently reduced to 10.

number of unrelated individuals permitted in single-family residences was addressed by both state and local law. The City's ordinance at the time Oxford House-C opened permitted up to three unrelated people to live in a single-family residence. State law, however, required cities to allow up to eight handicapped individuals and two houseparents to live together in single-family residences. §89.020.2 R.S.Mo.

Before and after Oxford House sued the City, considerable correspondence occurred between the attorney who made the zoning code enforcement decisions, City Counselor David Bohm, and various representatives of Oxford House and the State Mental Health Department. On numerous occasions Bohm made it clear that the City would follow the state law regarding housing for the handicapped (§89.020.2 R.S.Mo.) and allow eight recovering alcoholics and drug addicts to live at the Oxford Houses-C and Oxford House-W without a variance. But Bohm advised Oxford House that if it wanted more than eight handicapped individuals in either house, a zoning variance would be needed from the City.[3]

As a matter of national policy, Oxford House refuses to apply for variances or to submit to any local permitting requirement unless families must obtain the same permits.[4] In keeping with that policy, the residents of Oxford House-C and Oxford House-W refused to apply for a variance that, if granted, would have permitted more than eight handicapped individuals in the respective houses. Following Oxford House's refusal to comply with the City's zoning code, enforcement efforts began and Oxford House sued the City.

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[3] Building inspector Murphy also spoke with Oxford House representatives about appeals and variance applications. Tr. III, 122.

[4] Paul Molloy, executive chief officer of Oxford House, described the policy as follows:

> As a matter of practice, Oxford House, Inc. does not seek prior approval of zoning regulations before moving into a residential neighborhood. It considers itself no different from a biological family, and its members just move into any suitable house. City App. 324.

## REASONS FOR DENYING THE WRIT

### The Petition Should Be Denied Because It Is Based Solely On Issues of Fact Which Present No Important Questions Of Federal Law.

Petitioners dispute a number of fact issues considered by the appeals court and urge that this Court grant their petition of certiorari ("Petition") so that alleged mistakes concerning those fact issues may be revisited. Petitioners do not allege a conflict in the circuits. In fact the court of appeals decision is similar to the decision in *United States v. Village of Palatine*, 37 F.3d 1230 (7th Cir. 1994). No federal or state statute was declared unconstitutional; and petitioners do not contend that the issues raised in their Petition are especially significant. Supreme Court Rule 10(c). Moreover, the only consequence of the court of appeals' decision is that Oxford House-C and Oxford House-W will have to apply for variances from the City's zoning code if they wish to continue housing 10 and 12 residents, respectively. The City has not attempted to enforce its codes during the pendency of this litigation. Oxford House, without objection from the City, obtained a stay of the court of appeals' mandate while this Petition is being considered.

Petitioners dispute the court of appeals' application of the "clearly erroneous" standard as it pertained to their allegations that (a) City officials harbored an animus toward recovering drug addicts and alcoholics; (b) that Oxford House-C and Oxford House-W residents were treated differently from other groups; and (c) that no applications for zoning variances were required for Oxford House-C and Oxford House-W because such applications would have been futile. The contentions will be addressed in the order they were presented in the Petition.

#### A. Alleged Animus of City Officials

The first fact issue raised by petitioners is the alleged discriminatory motivation of certain City officials. Petition, p. 7. Although the court of appeals did address the motivation issue,

its discussion was prefaced with the conclusion that any such motivation was irrelevant because the City's zoning ordinance favored petitioners over other groups and because petitioners failed to show they were treated differently from other groups. App. A-5. Although the court of appeals held that the discriminatory intent issue was immaterial in light of its other findings, the court went on to address that issue because the magistrate made various findings on the topic.[5] App. A-5. It is clear from the decision that the court of appeals considered those findings unnecessary to reach its conclusion. Petitioners do not explain why they believe a discussion that amounts to dicta warrants examination by this Court. The court of appeals' comments concerning the magistrate's international discrimination findings did not directly affect the outcome and merit no consideration here.[6]

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[5] The court of appeals stated:

> Having concluded Oxford House did not show the City treated the Oxford Houses differently from any other group, we believe the City's enforcement actions were lawful regardless of whether some City officials harbor prejudice or unfounded fears about recovering addicts. Because the district court found the City's actions were motivated by bias and stereotypes, however, we will briefly discuss the evidence of discriminatory intent. App., A-5.

[6] Regarding the animus allegation, Oxford House focuses on a comment by the zoning administrator that he would not want to live next door to an Oxford House. Oxford House fails to note that the zoning administrator testified that would not want to live next door to *any* house with 10 or 12 young men living in it, regardless of whether it was a group home, fraternity house or other dwelling. Tr. III, 221-222. This is one instance of what the court of appeals meant when it said certain comments were taken "out of context." App., A-6.

Regarding the alleged animus of neighbors, the fact is that a single complaint to the Citizens' Service Bureau resulted in the City inspections of Oxford House-C. Tr. III, 76, 80; City App. 143. There was no organized neighborhood opposition and the affected neighborhood associations did not oppose the Oxford Houses. Tr. VI, 32. Nor had the alderman expressed opposition to the houses as the magistrate found. City App. 269-270.

Finally, even if the comments of the building inspector and zoning official are given weight, the law determines their authority and, thus, the weight that should be given to those statements. The magistrate viewed the statements as dispositive. She was wrong do so under Missouri law. Findings based on an erroneous view of the law may be reversed under the "clearly erroneous" standard. *Johnson v. Arkansas State Police*, 10 F.3d 547, 558 (8th Cir. 1993). It was David Bohm, the city counselor, who made the policy decision to enforce the City's codes. An individual municipal employee cannot act for the municipality unless he possesses authority under the law to do so. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 119 (1988). Building inspectors simply inspect buildings and report their findings. They do not make policy. The magistrate operated under an erroneous view of the law. *See also, Smith & Lee Associates, Inc. v. City of Taylor*, 13 F.3d 920, 930-32 (6th Cir. 1992); *Y.W.C.A. of Greater Kansas City, Inc. v. Dismas House of Kansas City*, 869 S.W.2d 894, 898-99 (Mo.App. 1994).

**B. Differential Treatment**

(1) Zoning Code

Petitioners challenge the court of appeals' judgment that they were not treated differently from other groups. As the court of appeals observed, the City's zoning provision favors Oxford House residents on its face. App. A-4. While no more than three unrelated people may live together in a single-family residence, up to eight unrelated handicapped people may do so. A-4.[7]

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[7] To the extent Oxford House argues that the City's "eight plus two" restriction discriminates on its face, such argument is not properly raised in this Petition because it is not pertinent to whether the court of appeals misapplied the clear error standard regarding certain fact determinations. In any event, the City's zoning code favors petitioners on its face (App. A-4) and petitioners presented no evidence that Oxford Houses were treated differently from other groups.

Petitioners attempt to finesse this point by stating that the zoning code treats Oxford House residents "differently" from others and that "different" treatment is necessarily "discrimination." Petition, A-14, 15. But here "different" means the code treats Oxford House better than other groups of unrelated people, not worse.[8] Handicapped individuals, including recovering drug addicts and alcoholics, enjoy benefits under the code that other groups do not.

Nevertheless, petitioners contend that the City's zoning code evidences a discriminatory animus against them because it allows bed and breakfast establishments in residential areas if a conditional use permit is obtained first. Petition, p. 16.[9] Petitioners apparently argue that they too should be allowed to apply for conditional use permits instead of variances. There is no reason to believe that the conditional use process is more or less preferable than the variance process. Nor is there any indication of any substantive difference between the two processes. Missouri allows use variances (§89.090 R.S.Mo.) and the City chose variance applications as the vehicle for considering requests for group homes with more than eight residents.[10] All of this argument is unnecessary, however, because Oxford House refuses to submit to any permit or variance procedure unless

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[8] In any event, an analysis of whether an ordinance is facially discriminatory is a legal that has nothing to do with petitioners' claim that the court of appeals misapplied the clearly erroneous standard in evaluating the magistrate's findings of fact.

[9] The Petition also notes that bed and breakfast districts may be created under the code where such uses would be permitted as a matter of right. Petition, p. 16. But there was no evidence any such districts were actually created or, if they were, whether they encompassed areas zoned for single-family use.

[10] Oxford House, although it did contend that the City's zoning code was inconsistent in establishing conditional uses (Oxford House Brief, p. 28), did not present this precise argument to the court of appeals.

families are required to do so.[11] Thus, it did not matter what process the City provided, Oxford House would not comply. Had the City's zoning code required conditional use permits for the two group homes, Oxford House still would have refused, the City Counselor still would have initiated enforcement efforts, and Oxford House still would have sued.

Finally, the City's group home provisions were well-suited to meet Oxford House's needs. It is consistent with the testimony of all the witnesses, including medical experts, who agreed that eight is a good number for an Oxford House from a therapeutic standpoint.[12] It is consistent with the requirement in 42 U.S.C. §300x-25(a)(1) that Oxford Houses have at least six residents to qualify for federal loan funds. It is consistent with §89.020.2 R.S.Mo. which requires Missouri cities to allow up to eight handicapped individuals to live together in single-family homes. And it is consistent with the fact that no Oxford House in the United States with eight or more residents has ever failed for financial reasons.[13]

(2) City's Treatment of Other Groups

The court of appeals decided that the Oxford Houses were not singled out for prosecution for two reasons. First, although Oxford House pointed to a small number of religious groups of more than three unrelated people in single-family zones, Oxford House failed to show whether or not those groups were "grandfathered" under the code's exception for pre-existing uses. App. A-5. Indeed, there was no evidence that anyone other than Oxford House violated the zoning code. Petitioners contend that

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[11] Tr. I, 62; City App. 232, 324.

[12] Tr. I, 79, 87-88 (Oxford House, Inc.'s executive director); Tr. II, 63-64 (Oxford House medical expert); Tr. VII, 11-12 (City medical expert); City App. 326-327.

[13] Tr. I, 88-89; City App. 341-343. A house in Jacksonville with 12 residents, referenced at Tr. I, 89, failed for other reasons. Tr. I, 77-78.

they produced "undisputed" evidence that those uses were not pre-existing uses under the code. In fact no conclusive evidence was presented on that point. Furthermore, the court of appeals observed: "At any rate, Oxford House did not show anyone in the building inspector's office knew of the alleged zoning violations." *Id.*[14] In other words, even if other groups actually did violate the zoning code, which was not established, the court of appeals would have ruled the same way because City officials were unaware of the violations. *Id.* The City could not treat one zoning code violator different from another when it was only aware of one of the violations.

In any event, the pre-existing use issue was raised by the City in its brief to the court of appeals and petitioners merely repeated their conclusions that other groups illegally occupy residences without benefit of conditional use permits or variances.[15] Petitioners should not be permitted to correct their omission in the court of appeals by raising other arguments for the first time in their Petition to this Court. Similarly, petitioners did not dispute, until now, that the City was unaware of the purported violations cited by petitioners. Petitioners should not be permitted to dispute that point now for the first time.

### C. Oxford House Policy, the Variance Process and Petitioners' Futility Claim

Oxford House's claim under the Fair Housing Act that the City failed to reasonably accommodate Oxford House's housing needs (42 U.S.C. §3604(f)(3)(b)) failed because Oxford House never took advantage of the City's vehicle for considering accommodation requests — the variance process. App. A-6, 7. Oxford House attempts to justify its refusal to seek a variance by

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[14] This point does not contradict the magistrate's findings. The magistrate believed the City's lack of knowledge of other offenders was irrelevant, or even supportive of Oxford House's discrimination claims. App. A-47 n. 17.

[15] Oxford House Brief in court of appeals, p. 43.

asserting that the effort would have been futile because some neighbors and an alderman would have opposed any such applications. Petition, pp. 20-21.

As a preliminary matter, any perception of futility had nothing to do with Oxford House's decision not to seek variances. They did not apply because it is national Oxford House policy not to apply.[16] That "high-handed" policy is flawed and has no basis in the Fair Housing Act. *Village of Palatine*, supra, 37 F.3d at 1234 (concurring opinion).[17]

The magistrate's conclusions regarding futility were brief and apparently based on the premise that "neighborhood groups" opposed the subject Oxford Houses. App. A-55. That premise was clearly wrong because the neighborhood associations encompassing the two houses did not oppose (or support) the houses.[18] Given that fact, the magistrate's conclusion must have been based on the assumption that some individuals opposed Oxford House; and that they would appear at a variance hearing and oppose any Oxford House application; and that the City's Board of Adjustment necessarily would heed those objections. The magistrate made no mention of the evidence that the Board sometimes grants variances over aldermanic and neighborhood opposition. App. A-54, 55.

The evidence did not justify all of the magistrate's assumptions. Indeed, if the magistrate's reasoning had been upheld, any applicant for a variance could, once confronted with opposition from a neighbor or alderman, simply abandon the process, sue,

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[16] Tr. I, 62; City App. 232, 324.

[17] The City urges the Court to adopt the reasoning in *Virginia Beach*, 825 F.Supp. 1251 (E.D. Va. 1993), which provides the most thorough analysis of this issue to date.

[18] The neighborhood association near Oxford House-C actually met at the instigation of a neighbor-drug abuse counselor to assist Oxford House, not oppose it. Tr. Vol. VI, 24-28.

and evade the ripeness and exhaustion of remedies issues by claiming the variance process would have been futile. The magistrate's finding of futility was based on an erroneous view of the law, which justifies reversal under the "clearly erroneous" standard. *Johnson v. Arkansas State Police*, supra, 10 F.3d at 558. And given the fact that variance applications are sometimes granted in the City despite neighborhood or aldermanic objections,[19] the magistrate's futility conclusion was merely speculation.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[19] Tr. Vol. VI, 15, 32; Petition, p. 21.

(3)

No. 95-1925

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

OXFORD HOUSE-C., an unincorporated association; OXFORD HOUSE, INC., a Delaware not-for-profit corporation; OXFORD HOUSE-W., an unincorporated association; MISSOURI DEPARTMENT OF MENTAL HEALTH, DIVISION OF ALCOHOL & DRUG ABUSE,

*Petitioners,*

VS.

CITY OF ST. LOUIS,

*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

## PETITIONERS' SUPPLEMENTAL BRIEF

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## ADDITIONAL QUESTION PRESENTED FOR REVIEW

Whether a municipality seeking to protect single-family neighborhoods may limit the number of individuals with disabilities who may live together in a group home?

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42 U.S.C. §3604(f)(9) ..... 6

## REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari was filed in this case on May 23, 1996. At the time, petitioners argued that the Eighth Circuit had failed to analyze the City's eight-handicapped-person rule under the established framework for facially discriminatory policies. *See* Petition for Writ of Certiorari at 15. Since the petition was filed, a conflict has developed among the circuits regarding the standard for defendant's burden of justification in cases of facial discrimination under the Fair Housing Act as amended, 42 U.S.C. §§3601 *et seq.*

In the decision below, the Eighth Circuit held that a "rational basis" was sufficient to justify the City of St. Louis' zoning policy which, on its face, was directed exclusively at individuals with disabilities. *See* Appendix to Petition for Writ of Certiorari at pp. A-4—A-5 ("App."). On July 16, 1996, the Sixth Circuit in *Larkin v. State of Michigan Department of Social Services*, 89 F.3d 285, 290 (6th Cir. 1996), cited the Eighth Circuit's decision in this case and expressly rejected the rational basis test that it had employed. Instead of adopting that minimal standard, the Sixth Circuit held that, under the Fair Housing Act, a disability-specific policy must be warranted by the unique, specific needs and abilities of those handicapped persons to whom it would be applied. The Sixth and Eighth Circuit standards also differ from the rule set out by the Tenth Circuit in *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503-04 (10th Cir. 1995).

The Sixth, Eighth, and Tenth Circuit opinions present a conflict regarding the burden that defendant must meet to justify an explicitly disability-based policy under the Fair Housing Act.

## I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING DEFENDANT TO ESTABLISH A STATUTORY AFFIRMATIVE DEFENSE IN ORDER TO JUSTIFY A FACIALLY DISCRIMINATORY POLICY

In cases involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. §§621 *et seq.* (ADEA), this Court has held that a facially discriminatory must be justified by one of the affirmative defenses established by the statute in question. In *International Union, UAW v. Johnson Controls, Inc.*, __ U.S. __, 111 S.Ct. 1196 (1991), the Court found that the business necessity test used in Title VII disparate impact cases was inapposite because the fetal protection policy at issue discriminated on its face. Since the policy was gender-specific, it was sex discrimination forbidden under Title VII unless defendant could establish one of the statute's affirmative defenses. *Id.* at 1204. *See also City of Los Angeles, Dept. of Water v. Manhart*, 435 U.S. 702, 716-17 (1978); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

Similarly, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), the framework used by the Court to analyze an age-specific policy under the ADEA required defendants to prove one of the Act's five affirmative defenses. As with the disparate impact test urged in *Johnson Controls*, the Court found the disparate treatment formula of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), to be inapplicable to an explicitly age-based policy. The discrimination is proved by the express terms of the policy, not by evidence of its effect or its malevolent or benign motivation. Having been proved, that discrimination may be excused only by a defense permitted by Congress.

This Court has indicated that Title VII precedents are instructive in interpreting the Fair Housing Act. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). Together

with the ADEA, Title VII and the Fair Housing Act "are part of a coordinated scheme of federal civil rights law enacted to end discrimination." *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988). In light of the Title VII and ADEA precedents relevant here, the inescapable conclusion is that a rational basis is not sufficient to justify a facially discriminatory policy under the Fair Housing Act.

## II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE SIXTH AND TENTH CIRCUITS REFUSING TO APPLY A RATIONAL BASIS TEST TO FACIALLY DISCRIMINATORY POLICIES UNDER THE FAIR HOUSING ACT

In the decision below, the Eighth Circuit imported into its Fair Housing Act analysis the rational relationship test from Equal Protection jurisprudence. The Court of Appeals for the Eighth Circuit recognized that the City of St. Louis' rule limiting group homes in single-family neighborhoods to eight "mentally or physically handicapped" persons plus two houseparents or guardians was disability-specific "on its face." App. A-4, A-77. However, rather than requiring defendant to establish one of the affirmative defenses defined by Congress in the Fair Housing Act, the court held that the applicable standard was whether the City had a "rational basis" for enacting the ordinance. App. A-4. Relying on the purposes traditionally proffered for single-family use restrictions, the court concluded that St. Louis' eight-plus-two rule had a rational basis and thus was valid under the Fair Housing Act.[1] App. A-4—A-5.

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[1] The rational basis test has been invoked in other Fair Housing Act cases involving explicitly disability-based policies. In *Hovson's Inc. v. Township of Brick*, No. 94-4265, slip op. at 13 (D. N.J. June 28, 1995), *rev'd on other grounds*, 89 F.3d 1096 (3d Cir. 1996), the district court dismissed an intentional discrimination challenge to a municipal zoning ordinance which

*(Footnote 1 continued on next page)*

In *Larkin*, the Sixth Circuit specifically declined to adopt the rational basis standard applied by the Eighth Circuit in the decision below. The *Larkin* case involved a Fair Housing Act challenge to a state zoning enabling statute which prohibited any licensed group home for individuals with disabilities from locating within 1500 feet of another such facility and required the municipality where the group home would be located to give notification to all residents whose property lines were within 1500 feet of the proposed facility. The Sixth Circuit found that the spacing and notice requirements were, by their very terms, facially discriminatory and therefore properly analyzed as a type of intentional discrimination. *Larkin*, 89 F.3d at 290. The Sixth Circuit had never explicitly determined the level of burden that a facially discriminatory policy imposes on a defendant under the Fair Housing Act. In the process of formulating its standard, the Sixth Circuit considered and rejected the "Eighth Circuit . . . rule that discriminatory statutes are subject to a rational basis scrutiny, i.e., they will be upheld if they are rationally related to a legitimate government objective." *Larkin*, 89 F.3d at 290. Instead, the Sixth Circuit settled on a standard which requires a defendant to show that its facially discriminatory policy is "'warranted by the unique and specific needs and abilities of those handicapped persons' to whom the regulations apply." *Id.*, quoting *Marbrunak, Inc. v. City of Stow, Ohio*, 974 F.2d 43, 47

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*(Footnote 1 continued)*

excluded nursing homes from certain residential districts, finding that the ordinance was "rationally related to . . . legitimate governmental interests" and therefore "facially valid."

In *North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497, 500-01 (N.D. Ill. 1993), the court enjoined enforcement of a facially discriminatory ordinance requiring group homes for the handicapped to be occupied "on a permanent basis" and to have a state license. While it enjoined the ordinance, the court appeared to apply a hybrid standard which combined the constitutional rational basis test with the justification burden used in some disparate impact decisions.

(6th Cir. 1992). Like the Eighth Circuit, however, it did not require defendant to establish one of the Fair Housing Act's affirmative defenses.

The Tenth Circuit has articulated yet another standard for justifying facial discrimination under the Fair Housing Act. *Bangerter*, 46 F.3d at 1503. *Bangerter* involved state and local requirements for 24-hour supervision and establishment of a community advisory committee imposed on group homes for the handicapped. The Tenth Circuit recognized that these requirements facially singled out individuals with disabilites for differential treatment. In seeking to determine the appropriate standard for defendant's burden in cases of facial discrimination, the Tenth Circuit agreed that the constitutional rational basis test was not the proper standard under the Fair Housing Act.[2] "[T]he use of an Equal Protection analysis is misplaced here because

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[2] The Third Circuit affirmed without opinion a district court decision which similarly found the constitutional standard inappropriate under the Fair Housing Act. *Horizon House v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992), *aff'd without opinion*, 995 F.2d 217 (3d Cir. 1993). Although the trial court determined that the defendant's spacing requirement did not meet even the minimal level of scrutiny, it nevertheless concluded that "the standard under the [Fair Housing Act] is a higher level of scrutiny than the rational basis test applied to an equal protection analysis." *Id.* at 695 n.6. The decisions of several other district courts are also in conflict with the Eighth Circuit's decision here. *Potomac Group Home v. Montgomery County, Maryland*, 823 F. Supp. 1285, 1295 n.8 (D. Md. 1993); *United States v. Schuylkill Township*, No. 90-2165, 1990 U.S. Dist. LEXIS 15555, at *18 n.10 (E.D. Pa. November 16, 1990). Although they rejected the rational basis standard used by the Eigth Circuit in this case, none of these courts articulated an alternative test.

Another district court, however, applied a standard different from those used by the Sixth, Eighth, and Tenth Circuits. In *Association for Advancement of the Mentally Handicapped, Inc. v. City of Elizabeth*, 876 F. Supp. 614, 620 (D. N.J. 1994) the court recognized that the state and local zoning laws at issue were facially discriminatory, but it chose to adopt the standard imposed on defendants in the Third Circuit's disparate impact cases.

this case involves a federal statute and not the Fourteenth Amendment." *Id.* at 1503. Even though individuals with disabilites are not a suspect class for constitutional purposes, the Fair Housing Act "specifically makes the handicapped a protected class for purposes of a statutory claim—they are the direct object of the statutory protection." *Id.* In the view of the Tenth Circuit, the Fair Housing Act affords individuals with disabilities a higher level of protection than a rational basis test can provide.

For its own standard, the Tenth Circuit looked in part to "the language of the [Fair Housing Act] itelf." *Id.* Section 3604(f)(9) provides that the prohibition against discrimination on the basis of handicap does not require "that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. §3604(f)(9). Based on that statutory affirmative defense, the Tenth Circuit's standard permits the defendant to show that its discriminatory policy is justified by particular public safety concerns presented by the individual disabled residents at issue. *Id.* at 1503-04. In addition, the Tenth Circuit drew upon Title VII and Fair Housing Act precedents to allow special restrictions on the disabled if defendant can show that the restrictions confer a benefit in terms of housing opportunities for individuals with disabilities which clearly outweigh any burden they might impose. *Id.* at 1504. In the Tenth Circuit, then, defendant must establish that an explicitly disability-based policy is warranted either by "public safety" concerns or as "benign discrimination." *Id.* at 1503.

The conflict presented by these cases is clear and requires resolution by this Court.

## CONCLUSION

For the foregoing reasons, petitioners request this Court to issue its writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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